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U. S. Courts.

THE ANNOTATED
RULES OF PRACTICE
IN THE
UNITED STATES
COURTS

EDITED BY
WILLIAM WHITWELL DEWHURST
ATTORNEY-AT-LAW

SECOND EDITION

THE BANKS LAW PUBLISHING CO.
NEW YORK
1914

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JUN 17 1914

PREFACE

Changes made in the Rules of the Supreme Court and the Circuit Court of Appeals by reason of the adoption of the Judicial Code, and the revision of the Equity Rules promulgated by the Supreme Court November 4, 1912, have rendered it necessary to issue a Second Edition to this book. Questions of practice will arise under the new Equity Rules making the annotated cases decided under the former rules of great help and value in their solution. Where applicable they will be found printed under the corresponding rule as it now exists.

The reception given the first edition by the Bench and Bar has been so flattering that the editor feels justified in indulging the hope that the new edition will meet with even greater approval than was accorded the book when first published.

WILLIAM WHITWELL DEWHURST.

SAINT AUGUSTINE, FLORIDA,
January 1st, 1914.

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RULES
OF THE
SUPREME COURT OF THE UNITED STATES

FROM A. D. 1790 TO A. D. 1852

1 *Wheaton*, XVIII—1 *Peters*, VIII

RULE I

(February 3, 1790.)

Ordered, That JOHN TUCKER, Esq., of Boston, be the clerk of this court.

That he reside and keep his office at the seat of the national government, and that he do not practice either as an attorney or counselor in this court while he shall continue to be clerk of the same.

Clerk's office to be at seat of government. Clerk not to practice as an attorney or counsellor.

RULE II

(February 5, 1790.)

It shall be requisite (until further ordered) to the admission of attorneys or counsellors to practice in this court, that they shall have been such for three years past in the supreme courts of the State to which they respectively belong, and that their private and professional character shall appear to be fair.

Qualifications of attorneys and counsellors.

RULE III

(February 5, 1790.)

Counsellors shall not practice as attorneys, nor attorneys as counsellors, in this court.

Counsellors not to act as attorneys; and vice versa.

RULE IV

(February 5, 1790.)

[*Rescinded.*] Counsellors and attorneys shall respectively
Oath of attorneys and counsellors. take the following oath, viz: "I, —, solemnly swear that I will demean myself (as an attorney or counsellor of the court) uprightly, and according to law; and that I will support the Constitution of the United States."

See Rule 6.

RULE V

(February 5, 1790.)

All process of this court shall be in the name of the President of the United States (unless and
Process to run in the name of the President. until it shall otherwise be provided by law).

RULE VI

(February 7, 1791.)

Counsellors and attorneys admitted to practice in this
Oath of attorneys and counsellors, substituted in place of oath prescribed by Rule 4. court, shall take either an oath, or in proper cases, an affirmation, of the tenor prescribed by the rule of this court on that subject, made February Term, 1790, viz: "I, —, do solemnly swear (or affirm, as the case may be) that I will demean myself as an attorney or counsellor of this court, uprightly, and according to law; and that I will support the Constitution of the United States."

RULE VII

(August 8, 1791.)

The chief justice, in answer to the motion of the Attorney-General, made yesterday, informs him
Practice of the courts of king's bench and Chancery in England to furnish outlines of practice. and the Bar, that this court consider the practice of the courts of king's bench, and of chancery, in England, as affording outlines for the practice of this court; and that they will, from time to time, make such alterations therein as circumstances may render necessary.

Now Rule 3.

RULE VIII

(February 4, 1795.)

The court gave notice to the gentlemen of the bar, that hereafter they will expect to be furnished with a statement of the material points of the case from the counsel on each side of a cause.

Counsel to furnish statement of points.

See Rule 29, Rule 53, and Rule 57.

Now Rule 21.

RULE IX

(February 17, 1795.)

All evidence on motion for a discharge upon bail must be by way of *deposition*, and not *viva voce*.

Evidence for discharge on bail to be by deposition.

RULE X

(August 12, 1796.)

When process at common law, or in equity, shall issue against a State, the same shall be served on the governor, or chief executive magistrate, and attorney-general of such State.

Process against a State; on whom to be served.

Process of subpoena, issuing out of this court, in any suit in equity, shall be served on the defendant sixty days before the return day of the said process; and further, that if the defendant, on such service of the subpoena, shall not appear at the return day contained therein, the complainant shall be at liberty to proceed *ex parte*.

Subpoena to be served 60 days before its return day.

Defendant not appearing, complainant may proceed *ex parte*.

Now Rule 5.

RULE XI

(February 13, 1797.)

The clerk of the court to which any writ of error shall be directed, may make return of the same, by transmitting a true copy of the record, and of all proceedings in the cause, under his hand and the seal of the court.

Return to a writ of error; how made.

See Rule 31.

Now Rule 8, Clause 1.

RULE XII

(August 7, 1797.)

No record of the court shall be suffered by the clerk to be taken out of his office, but by the consent of the court; otherwise to be responsible for it.

Records of court not to be taken from clerk's office; except how.

Now Rule 1, Clause 2.

RULE XIII

(August 15, 1800.)

IN THE CASE OF COURSE *v.* STEAD'S EXECUTORS, 4 *Cra.* 403.

The plaintiff in error shall be at liberty to show to the satisfaction of this court, that the matter in dispute exceeds the sum or value of two thousand dollars, exclusive of costs; this to be made to appear by affidavit, on — days' notice to the opposite party, or their counsel in Georgia.

Sum or value in dispute; how may be shown.

Rule as to affidavits to be mutual.

RULE XIV

(August 12, 1801.)

Counsellors may be admitted as attorneys in this court, on taking the usual oath.

Counsellors may be attorneys.

See Rule 8.

RULE XV

(December 9, 1801.)

In every case where the defendant in error fails to appear, the plaintiff may proceed *ex parte*.

Defendant not appearing, plaintiff may proceed *ex parte*.

Now Rule 17.

RULE XVI

(February Term, 1803.)

Where the writ of error issues within thirty days before the meeting of the court, the defendant in error is at liberty to enter his appearance, and proceed to trial; otherwise, the cause must be continued.

When defendant may go to trial, or have cause continued on writ of error.

See Rules 19 and 43.

RULE XVII

(February Term, 1803.)

In all cases where a writ of error shall delay the proceedings on the judgment of the Circuit Court, and shall appear to have been sued out merely for delay, damages shall be awarded, at the rate of *ten per centum per annum* on the amount of the judgment.

Damages, when writ of error sued out for delay.

Now Rule 23, Clause 2.

RULE XVIII

(February Term, 1803.)

In such cases, where there exists a real controversy, the damages shall be only at the rate of *six per centum per annum*. In both cases the interest is to be computed as part of the damages.

Damages, where there is a real controversy.

See previous rule.

RULE XIX

(February Term, 1806.)

All causes, the records in which shall be delivered to the clerk on or before the sixth day of a term, shall be considered as for trial in the course of that term. Where the record shall be delivered after the sixth day of the term, either party will be entitled to a continuance. In all cases where a writ of error shall be a supersedeas to a judgment rendered in any Circuit Court of the United States, except that for the District of Columbia, at least thirty days previous to the commencement of any term of this court, it shall be the duty of the plaintiff in error to lodge a copy of the record with the clerk of this court within the first six days of the term; and if he shall fail so to do, the defendant in error shall be permitted afterwards to lodge a copy of the record with the clerk, and the cause shall stand for trial in like manner

When causes at trial for the term.

When not.

Where writ of error is a supersedeas; when plaintiff to file copy of the record.

When the defendant may file a copy of the record.

as if the record had come up within the first six days; or he may, on producing a certificate from the clerk, stating the cause, and that a writ of error has been sued out, which operates as a supersedeas to the judgment, have the said writ of error docketed and dismissed. This rule shall apply to all judgments rendered by the court for the District of Columbia at any time prior to a session of this court.

In cases not put to issue at the August Term, it shall be the duty of the plaintiff in error, if errors shall not have been assigned in the court below, to assign them in this court at the commencement of the term, or so soon thereafter as the record shall be filed with the clerk, and the cause placed on the docket; and if he shall fail so to do, and shall also fail to assign them when the cause shall be called for trial, the writ of error may be dismissed at his costs; and if the defendant shall refuse to plead to issue, and the cause shall be called for trial, the court may proceed to hear an argument on the part of the plaintiff, and to give judgment according to the right of the cause; and that where there is no appearance for the plaintiff in error, the defendant may have the plaintiff called, and dismiss the writ of error; or may open the record, and pray for an affirm-
 ance. In such a case *costs go of course*.
 Montalet v. Murray, 3 Cranch, 249.

See Rules 16, 30, and 43.

First Clause, now Rule 9, Clause 1. Second Clause now Rule 16.

RULE XX

(February Term, 1803.)

Where damages are given by the rule passed in February Term, 1803,¹ the said damages shall be calculated to the day of the affirm-
 ance of the judgment in this court.

¹ Rules 17 and 18, now Rule 23, Clause 2, page 147, *post*.

RULE XXI

(February Term, 1807.)

All parties of this court, not being residents of the United States, shall give security for the costs accruing in this court, to be entered on the record. Non-residents to give security for costs.

Upon the clerk of this court producing satisfactory evidence, by affidavit, or the acknowledgment of the parties or their sureties, Clerk may have attachment to collect his costs. of having served a copy of the bill of costs due by them respectively, in this court, on such parties or their sureties, an attachment shall issue against such parties or sureties respectively, to compel payment of the said costs.

See Rule 37.

First Clause, now Rule 10, Clause 1. Second Clause, now Rule 10, Clause 8.

RULE XXII

(February Term, 1810.)

Upon the reversal of a judgment or decree of the Circuit Court, the party in whose favor the reversal is shall recover his costs in the Circuit Court. On reversals, costs go to party succeeding.

Now Rule 24, Clause 3.

RULE XXIII

(February Term, 1812.)

Only two counsel will be permitted to argue for each party, plaintiff and defendant in a cause. Only two counsel to be heard in a cause.

Now Rule 22, Clause 2.

RULE XXIV

(February Term, 1812.)

There having been two associate justices of the court appointed since its last session, *It is* Allotment of justices, 1812. *ordered,* that the following allotment be made of the chief justice and the associate justices of the said Supreme Court, among the circuits, agreeably to

the act of Congress in such case made and provided; and that such allotment be entered on record, viz:

For the first circuit—the Hon. JOSEPH STORY.

For the second circuit—the Hon. BROCKHOLST LIVINGSTON.

For the third circuit—the Hon. BUSHROD WASHINGTON.

For the fourth circuit—the Hon. GABRIEL DUVAL.

For the fifth circuit—the Hon. JOHN MARSHALL, C. J.

For the sixth circuit—the Hon. WILLIAM JOHNSON.

For the seventh circuit—the Hon. THOMAS TODD.

RULE XXV

(February Term, 1816.)

In all cases where further proof is ordered by the court,
In cases of further proof, the depositions which shall be taken shall be by a commission to be issued from this court, or from any Circuit Court of the United States.

See Rule 27.

Now Rule 12, Clause 1.

RULE XXVI

(February Term, 1817.)

Whenever it shall be necessary or proper, in the opinion
Original papers; how may be sent from the court below. of the presiding judge in any Circuit Court, or District Court exercising Circuit Court jurisdiction, that original papers of any kind should be inspected in the Supreme Court, upon appeal, such presiding judge may make such rule or order for the safe keeping, transporting, and return of such original papers, as to him may seem proper; and this court will receive and consider such original papers, in connection with the transcript of the proceedings.

Now Rule 8, Clause 4.

RULE XXVII

(February Term, 1817.)

In all cases of admiralty and maritime jurisdiction, where
Evidence in admiralty cases to be taken under a commission. new evidence shall be admissible in this court, the evidence by testimony of witnesses shall be taken under a commission to be issued

from this court, or from any Circuit Court of the United States, under the direction of any judge thereof; and no such commission shall issue but upon Commission to issue on interrogatories, and on notice to file cross-interrogatories. interrogatories to be filed by the party applying for the commission, and notice to the opposite party or his agent or attorney, accompanied with a copy of the interrogatories so filed, to file cross interrogatories within twenty days from the service of such notice: *Provided, however,* that nothing in this rule shall prevent any party from giving oral testimony in open court, in cases where, by Oral testimony; when may be given. law, it is admissible.

See Rules 9 and 25.

Now Rule 12, Clause 2.

RULE XXVIII

(February Term, 1821.)

Whenever, pending a writ of error or appeal in this court, either party shall die, the proper representatives in the personalty or realty of On death of a party, representatives may come in voluntarily. the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the suit, and thereupon the cause shall be heard and determined as in other cases; and if such representatives shall not voluntarily become parties, then the other party may suggest the death on the record, and there- Or an order may be entered for their appearance. upon, on motion, obtain an order, that unless such representatives shall become parties within the first ten days of the ensuing term, Condition of order. the party moving for such order, if defendant in error, shall be entitled to have the writ of error or appeal dismissed; and if the party so moving shall be plaintiff in error, he shall be entitled to open the record, and, on hearing, have the same reversed if it be erroneous: *Provided, however,* that a copy of every such order shall be Order to appear; where to be printed. printed in some newspaper at the seat of government in which the laws of the United States shall be printed by authority, for three successive weeks, at least

sixty days before the beginning of the term of the Supreme Court then next ensuing.

Rule announced in the cause of *Green v. Watkins*, 6 *Wheat*, 260.
Now Rule 15, Clause 1.

RULE XXIX

(February Term, 1821.)

After the present term, no cause standing for argument will be heard by the court, until the Causes not to be heard unless a printed brief furnished the court.— parties shall have furnished the court Brief; what to contain. with a printed brief or abstract of the cause, containing the substance of all the material pleadings, facts, and documents on which the parties rely, and the points of law and fact intended to be presented at the argument.

See Rule 8.

Now Rule 21, Clauses 1 and 2.

RULE XXX

(February Term, 1821.)

In all cases where a writ of error or an appeal shall be brought to this court from any judgment or decree rendered thirty days (before the term to which such writ of error or appeal shall be returnable), it shall be the duty of the plaintiff in error, or appellant, as the case may be, to docket the cause, and file the record thereof with the clerk of this court within the first six days of the term: on failure to do which, the defendant in error, or appellee, as the case may be, may docket the cause, and file a copy of the record with the clerk [and thereupon the cause shall stand for trial in like manner as if the record had been duly filed within the first six days of the term] or at his option, he may have the cause docketed and dismissed, upon producing a certificate from the clerk of the court wherein the judgment or decree was rendered, stating the cause, and certifying that such writ of error or appeal had been duly sued out and allowed.

See Rule 43; also Rules 16 and 19.

Now Rule 9, Clause 1.

RULE XXXI

(February Term, 1823.)

No cause will hereafter be heard, until a complete record, containing in itself, without reference Causes not to be heard without a complete record being filed. *aliunde*, all the papers, exhibits, depositions, and other proceedings which are necessary to the hearing in this court, shall be filed.

See Rule 11.

Now Rule 8, Clause 3.

RULE XXXII

(February Term, 1824.)

No certiorari for diminution of the record shall be hereafter awarded in any cause, unless a Certiorari awarded only on motion. motion therefor shall be made in writing; and the facts on which the same is founded shall, if not admitted by the other party, be verified by affidavit. And all motions for such certiorari shall be Motion; when to be made. made at the first term of the entry of the cause: otherwise the same shall not be granted, unless upon special cause shown to the court, accounting satisfactorily for delay.

Now Rule 14.

RULE XXXIII

(February Term, 1824.)

In all cases of equity and admiralty jurisdiction heard in this court, no objection shall hereafter be allowed to be taken to the In equity and admiralty causes, objections to evidence not allowed, unless made in the court below. admissibility of any deposition, deed, grant, or other exhibit found in the record as evidence, unless objection was taken thereto in the court below, and entered of record; but the same shall otherwise be deemed to have been admitted by consent.

Now Rule 13.

the party excepting be required to state distinctly the several matters of law in such charge to which he excepts; and that such matters of law and those only, be inserted in the bill of exceptions, and allowed by the court.

Now Rule 4.

RULE XXXIX

(January Term, 1833.)

(1) During the session of the court, any gentleman of the bar having a cause on the docket, and wishing to use any book or books in the law library, shall be at liberty, upon application to the clerk of the court, to receive an order to take the same (not exceeding at any one time three) from the library, he being thereby responsible for the due return of the same within a reasonable time, or when required by the clerk. And it shall be the duty of the clerk to keep, in a book for that purpose, a record of all the books so delivered, which are to be charged against the party receiving the same. And in case the same shall not be so returned, the party receiving the same shall be responsible for, and forfeit and pay twice the value thereof; as also one dollar per day for each day's detention beyond the limited time.

(2) During the session of the court, any judge thereof may take from the law library any book or books he may think proper, he being responsible for the due return thereof.

Now Rule 7.

RULE XL

(January Term, 1833.)

Whereas, it has been represented to the court, that it would in many cases accommodate counsel, and save expense to parties, to submit causes upon printed arguments. It is therefore

Ordered, that in all cases brought here on appeal, writ of

to the court. Every cause which shall have been twice called in its order, and passed, and put Causes called twice, to go over to next term. at the foot of the docket, shall, if not again reached during the term it was called, be continued to the next term of the court.

Now Rule 26, Clauses 1 and 2.

RULE XXXVII

(January Term, 1831.)

(1) In all cases the clerk shall take of the plaintiff a bond with competent security, to respond to Plaintiff to give security for costs. costs, in the penalty of two hundred dollars, or a deposit of that amount to be placed in bank subject to his draft.

(2) In all cases the clerk shall have fifteen copies of the records printed for the court, provided Fifteen copies of record to be printed. the government will admit the item in the expenses of the court.

(3) In all cases the clerk shall deliver a copy of the printed record to each party. And in cases of Each party to have a copy of the record. dismissal (except for want of jurisdiction) or affirmance, one copy of the record shall be taxed against the plaintiff, which charge in- Plaintiff, when to pay for copy of record. cludes the charge for the copy furnished him.

In case of reversal and dismissal for want of jurisdiction, each party shall be charged with When each party to pay half the cost of the record. one-half the legal fees for a copy.

See Rule 21.

First Clause, now Rule 10, Clause 1. Second and Third Clauses, now Rule 10, Clause 6. Third Clause, now Rule 10, Clause 7.

RULE XXXVIII

(January Term, 1832.)

Hereafter, the judges of the Circuit and District Courts shall not allow any bill of exceptions, Bills of exceptions, what to contain. which shall contain the charge of the court at large to the jury in trials at common law, upon any general exception to the whole of such charge. But that

the party excepting be required to state distinctly the several matters of law in such charge to which he excepts; and that such matters of law and those only, be inserted in the bill of exceptions, and allowed by the court.

Now Rule 4.

RULE XXXIX

(January Term, 1833.)

(1) During the session of the court, any gentleman of the bar having a cause on the docket, and wishing to use any book or books in the law library, shall be at liberty, upon application to the clerk of the court, to receive an order to take the same (not exceeding at any one time three) from the library, he being thereby responsible for the due return of the same within a reasonable time, or when required by the clerk.

Books from the library; how obtained by members of the bar. And it shall be the duty of the clerk to keep, in a book for that purpose, a record of all the books so delivered, which are to be charged against the party receiving the same. And in case the same shall not be so returned, the party receiving the same shall be responsible for, and forfeit and pay twice the value thereof; as also one dollar per day for each day's detention beyond the limited time.

Clerk to keep a record of books lent. Penalty for not returning. (2) During the session of the court, any judge thereof may take from the law library any book or books he may think proper, he being responsible for the due return thereof.

Now Rule 7.

RULE XL

(January Term, 1833.)

Whereas, it has been represented to the court, that it would in many cases accommodate counsel, and save expense to parties, to submit causes upon printed arguments. It is therefore

Ordered, that in all cases brought here on appeal, writ of

error, or otherwise, the court will receive printed arguments, if the counsel on either or both sides shall choose so to submit the same.

Now Rule 20, Clause 1.

RULE XLI

(January Term, 1834.)

Ordered, That the original opinions of the court, delivered to the reporter, be filed in the office of the clerk of the court for preservation Opinions of the court to be filed with the clerk. as soon as the volume of reports for the term, at which they are delivered, shall be published.

See Rule 42.

Now Rule 25, Clause 2.

RULE XLII

(January Term, 1835.)

All the opinions delivered by the court since the commencement of the term shall be forthwith delivered over to the clerk to be Opinions of the court to be recorded, recorded.

And all opinions hereafter delivered by the court shall immediately, upon the delivery thereof, be in like manner delivered over to the clerk to be recorded. And it shall be the duty of the clerk to cause the same to be forthwith recorded, and to deliver the originals with a transcript of the judgment or decree of the court and delivered to the reporter. thereon to the reporter, as soon as the same shall be recorded.

And all the opinions of the court shall as far as practicable, be recorded during the term, so To be recorded during term. that the publication of the reports may not be delayed thereby.

Now Rule 25, Clause 1.

RULE XLIII

(January Term, 1835.)

(1) In all cases where a writ of error, or an appeal, shall be brought to this court from any judgment or decree rendered thirty days On writ of error or appeal, when plaintiff to file record. before the commencement of the term, it shall be the duty

of the plaintiff in error, or appellant, as the case may be, to docket the cause and file the record thereof with the clerk of this court within the first six days of the term.

If he shall fail so to do, the defendant in error, or appellee,

When defendant may file record. as the case may be, may docket the

cause and file a copy of the record with the clerk, in which case it shall stand for argument at the

Or have the cause docketed and dismissed. term; or at his option he may have the

cause docketed and dismissed upon producing a certificate from the clerk of the court, wherein the judgment or decree was rendered, stating the cause and certifying that such writ of error or appeal had been duly sued out and allowed.

(2) No writ of error or appeal shall be docketed, or the Terms of filing record after first six days of term. record of the cause filed by the plaintiff

in error, or appellant, after the first six days of the term, except upon the terms that the cause shall stand for argument during the term, or be continued at the option of the defendant in error, or appellee. But in

Plaintiff cannot file the record, after cause has been dismissed, except on leave. no case shall the plaintiff in error, or appellant, be entitled to docket the

cause and file the record, after the same shall have been docketed and dismissed in the manner provided for in the preceding rule, unless by order of the court, or with the consent of the opposite party.

(3) In all cases where the cause shall not be docketed

Record not filed in the first 30 days of term, the cause to go over to next term. and the record filed with the clerk by either party until after thirty days from the commencement of the term, the cause

shall stand continued until the next term.

See Rules 15, 19, and 30.

Now Rule 9.

RULE XLIV

(January Term, 1837.)

When a printed argument shall be filed for one or both

Filing of a printed argument an appearance by counsel. parties, the case shall stand on the same footing as if there were an ap-

pearance by counsel.

See Rule 40.

Now Rule 20, Clause 2.

RULE XLV

(January Term, 1838.)

In all cases where any suit shall be dismissed in this court, except where the dismissal shall be for want of jurisdiction, costs shall be allowed for the defendant in error, or appellee, as the case may be, unless otherwise agreed by the parties.

On dismissal, costs to go to defendant.

In all cases of affirmance of any judgment or decree in this court, costs shall be allowed to the defendant in error, or appellee, as the case may be, unless otherwise ordered by the court.

On affirmance, costs to go to defendant.

In all cases of reversals of any judgment or decree in this court, except where the reversal shall be for want of jurisdiction, costs shall be allowed in this court for the plaintiff in error, or appellant, as the case may be, unless otherwise ordered by the court.

On reversal, costs to go to plaintiff.

Neither of the foregoing rules shall apply to cases where the United States are a party; but in such cases no costs shall be allowed in this court for or against the United States.

Costs not allowed for or against the United States.

In all cases of the dismissal of any suit in this court, it shall be the duty of the clerk to issue a mandate, or other proper process, in the nature of procedendo, to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain.

In cases of dismissal this court to send a mandate to the court below.

When costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other process, sent to the court below, and annex to the same the bill of items taxed in detail.

Costs allowed, to be inserted in the mandate.

Now Clauses 1 to 6 of Rule 24.

RULE XLVI

(January Term, 1838.)

All motions hereafter made to the court shall be reduced to writing, and shall contain a brief statement of the facts and objects of the motion.

Motions to be in writing.

Now Rule 6, Clause 1.

made under the authority of the inferior court, or admitted to be correct, the record shall not be printed, but the case shall be reported to this court by the clerk, and the court, will thereupon remand it to the inferior court in order that a translation may be there supplied and inserted in the record.

RULE LXI

(December Term, 1851.)

When the death of a party is suggested, and the representatives of the deceased do not appear by the tenth day of the second term next succeeding the suggestion, and no measures are taken by the opposite party within that time to compel their appearance, the case shall abate.

This rule shall apply to cases now on the docket, as well as to cases hereafter brought. And those now on the docket and falling within the rule, shall abate on the tenth day of December Term, 1852, unless upon special cause shown the court shall direct otherwise.

RULE LXII

(December Term, 1851.)

In cases where a writ of error is prosecuted to the Supreme Court, and the judgment of the inferior court is affirmed, the interest shall be calculated and levied from the date of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the State where such judgment is rendered.

The same rule shall be applied to decrees for the payment of money in cases in Chancery, unless otherwise ordered by this court.

This rule to take effect on the first day of December Term, 1852.

RULE LXIII

(December Term, 1853.)

First: In all cases where a writ of error or an appeal shall be brought to this court from any judgment or decree, rendered thirty days before the commencement of the term,

it shall be the duty of the plaintiff in error or appellant, as the case may be, to docket the cause, and file the record thereof with the clerk of this court within the first six days of the term; and if the writ of error or appeal shall be brought from a judgment or decree rendered less than thirty days before the commencement of the term, it shall be the duty of the plaintiff in error or appellant to docket the cause, and file the record thereof with the clerk of this court, within the first thirty days of the term; and, if the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee, may have the cause docketed and dismissed upon producing a certificate from the clerk of the court wherein the judgment or decree was rendered, stating the cause and certifying that such writ of error or appeal has been duly sued out and allowed. And in no case shall the plaintiff in error or appellant be entitled to docket the cause and file the record after the same shall have been docketed and dismissed under the rule, unless by order of the court or the consent of the opposite party.

Second: But the defendant in error or appellee may at his option docket the case and file a copy of the record with the clerk of this court; and if the case is docketed and a copy of the record filed with the clerk of this court by either party within the periods of time above limited and described by this rule the case shall stand for argument at the term.

Third: In all cases where the period of thirty days is mentioned in this rule it shall be extended to sixty days in writs of error and appeals from California, Oregon, Washington, New Mexico and Utah.—May 2, 1854. (See Rules 19, 30, 43).

ranged under the respective points; and no other book or case be referred to in the argument.

If one of the parties omits to file such a statement, he cannot be heard, and the case will be heard *ex parte* upon the argument of the party by whom the statement is filed.

Statement not filed, cause may be heard *ex parte* by party filing same.

This rule to take effect on the first day of December Term, 1849.

First Clause, now Rule 22, Clause 3. Second Clause, now Rule 21, Clause 1. Third Clause, now Rule 21, Clause 5.

RULE LIV

(December Term, 1849.)

[*Rescinded.*] When an appearance is not entered on the record for either the plaintiff or defendant, on or before the second day of the term next succeeding that on which the case is docketed, it shall be dismissed at the costs of the plaintiff.

No appearance entered at second term, case will be dismissed.

Rescinded by Rule 59.
Now Rule 18.

RULE LV

(December Term, 1849.)

When a case is called for argument at two successive terms, and upon the call at the second term neither party is prepared to argue it, it shall be dismissed at the costs of the plaintiff, unless sufficient cause is shown for further postponement.

Case called for argument two terms and neither party prepared, will be dismissed.

Now Rule 19.

RULE LVI

(December Term, 1849.)

Printed arguments, under the fortieth Rule shall not hereafter be received, unless filed within the first ten days of the term.

Printed arguments to be filed within ten days of term.

See Rule 40 and Rule 52. See present Rule 20, Clause 1.

RULE LVII

(December Term, 1849.)

Twelve printed copies of the abstract, points, and authorities required by the fifty-third Rule, ^{Twelve copies of abstract to be filed; and how distributed.} must be filed with the clerk three days before the case is called for argument; nine of these copies for the court, one for the reporter, one for the opposing counsel, and the remaining one to be retained by the clerk. This order to take effect on the first day of May next.

~~See~~ Rules 8, 29, 37, and 53. See present Rule 21.

RULE LVIII

(December Term, 1850.)

When a case is taken up for trial, upon the regular call of the docket, and argued orally in be- ^{Cause argued orally by one party, not heard on the printed argument of the other party unless.} half of only one of the parties, no printed argument will be received, unless it is filed before the oral argument begins, and the court will proceed to consider and decide the case upon the *ex parte* argument. This rule to take effect after the present term.

See Rules 40 and 52.

Now Rule 20, Clause 3.

RULE LIX

(December Term, 1851.)

When a case is reached in the regular call of the docket, and no appearance is entered for either party, the case shall be dismissed at the cost of the plaintiff, and the fifty-fourth Rule, adopted at December Term, 1849, be, and the same is hereby rescinded.

Now Rule 18.

RULE LX

(December Term, 1851.)

Ordered, That whenever any record, transmitted to this court upon a writ of error or appeal, shall contain any document, paper, testimony, or other proceeding in a foreign language, and the record does not also contain a translation of such document, paper, testimony, or other proceeding

made under the authority of the inferior court, or admitted to be correct, the record shall not be printed, but the case shall be reported to this court by the clerk, and the court, will thereupon remand it to the inferior court in order that a translation may be there supplied and inserted in the record.

RULE LXI

(December Term, 1851.)

When the death of a party is suggested, and the representatives of the deceased do not appear by the tenth day of the second term next succeeding the suggestion, and no measures are taken by the opposite party within that time to compel their appearance, the case shall abate.

This rule shall apply to cases now on the docket, as well as to cases hereafter brought. And those now on the docket and falling within the rule, shall abate on the tenth day of December Term, 1852, unless upon special cause shown the court shall direct otherwise.

RULE LXII

(December Term, 1851.)

In cases where a writ of error is prosecuted to the Supreme Court, and the judgment of the inferior court is affirmed, the interest shall be calculated and levied from the date of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the State where such judgment is rendered.

The same rule shall be applied to decrees for the payment of money in cases in Chancery, unless otherwise ordered by this court.

This rule to take effect on the first day of December Term, 1852.

RULE LXIII

(December Term, 1853.)

First: In all cases where a writ of error or an appeal shall be brought to this court from any judgment or decree, rendered thirty days before the commencement of the term,

it shall be the duty of the plaintiff in error or appellant, as the case may be, to docket the cause, and file the record thereof with the clerk of this court within the first six days of the term; and if the writ of error or appeal shall be brought from a judgment or decree rendered less than thirty days before the commencement of the term, it shall be the duty of the plaintiff in error or appellant to docket the cause, and file the record thereof with the clerk of this court, within the first thirty days of the term; and, if the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee, may have the cause docketed and dismissed upon producing a certificate from the clerk of the court wherein the judgment or decree was rendered, stating the cause and certifying that such writ of error or appeal has been duly sued out and allowed. And in no case shall the plaintiff in error or appellant be entitled to docket the cause and file the record after the same shall have been docketed and dismissed under the rule, unless by order of the court or the consent of the opposite party.

Second: But the defendant in error or appellee may at his option docket the case and file a copy of the record with the clerk of this court; and if the case is docketed and a copy of the record filed with the clerk of this court by either party within the periods of time above limited and described by this rule the case shall stand for argument at the term.

Third: In all cases where the period of thirty days is mentioned in this rule it shall be extended to sixty days in writs of error and appeals from California, Oregon, Washington, New Mexico and Utah.—May 2, 1854. (See Rules 19, 30, 43).

RULES

OF THE

SUPREME COURT OF THE UNITED STATES

REVISED AND CORRECTED AT THE DECEMBER TERM, 1858

21 Howard, xiv 1

RULE I—*Clerk*

(1) The clerk of this court shall reside and keep the office at the seat of the National Government, Clerk's office.—Clerk not to practice. and he shall not practice, either as attorney or counsellor, in this court, or in any other court, while he shall continue to be clerk of this court.

(2) The clerk shall not permit any original record or paper to be taken from the court room, or from the office, without an order from the court.

RULE II—*Attorneys, etc.*

(1) It shall be requisite to the admission of attorneys or counsellors to practice in this court, Qualifications of attorneys. that they shall have been such for three years past in the Supreme Courts of the States to which they respectively belong, and that their private and professional character shall appear to be fair.

(2) They shall respectively take and subscribe the following oath or affirmation, viz: Oath of attorneys.

I, ———, do solemnly swear [or affirm as the case may be] that I will demean myself, as an attorney and counsellor of this court, uprightly, and according to law; and that I will support the Constitution of the United States.

¹ The revision was made under the supervision of Chief Justice Taney. Osborne v. United States, 93 U. S. —, 23 L. ed. 872.

RULE III—*Practice*

This court considers the former practice of the courts of Practice of Supreme Court. king's bench and of chancery, in England, as affording outlines for the practice of this court; and they will, from time to time, make such alterations therein as circumstances may render necessary.

RULE IV—*Bill of Exceptions*

The judges of the Circuit and District Courts shall not What bill of exceptions to contain. allow any bill of exceptions which shall contain the charge of the court at large to the jury in trials at common law, upon any general exception to the whole of such charge. But the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepted and that such matters of law, and those only, shall be inserted in the bill of exceptions and allowed by the court.

RULE V—*Process*

(1) All process of this court shall be in the name of the Process in name of President. President of the United States.

(2) When process at common law or in equity shall issue Original process served on chief executive of State and attorney-general. against a State, the same shall be served on the Governor, or chief executive magistrate, and attorney-general of such State.

(3) Process of subpoena, issuing out of this court, in any Subpoena served 60 days before return day. suit in equity, shall be served on the defendant sixty days before the return day of the said process; and if the defendant, on such service of the subpoena, shall not appear at the return day contained therein, the complainant shall be at liberty to proceed *ex parte*.

RULE VI—*Motions*

(1) All motions hereafter made to the court shall be re-Motions to be in writing. duced to writing, and shall contain a brief statement of the facts and objects of the motion.

RULE VII—*Law Library—Conference Room*

(1) During the session of the court, any gentleman of the bar having a cause on the docket and wishing to use any book or books in the law library, shall be at liberty, upon application to the clerk of the court, to receive an order to take the same (not exceeding at any one time three) from the library, he being thereby responsible for the due return of the same within a reasonable time or when required by the clerk. And it shall be the duty of the clerk to keep in a book for that purpose, a record of all books so delivered, which are to be charged against the party receiving the same. And in case the same shall not be so returned, the party receiving the same shall be responsible for and forfeit twice the value thereof; as also one dollar per day for each day's detention beyond the limited time.

Books from library had on order of clerk.

(2) The clerk shall take charge of the books of the court, together with such of the duplicate law books as Congress may direct to be transferred to the court, and arrange them in the conference room, which he shall have fitted up in a proper manner; and he shall not permit such books to be taken therefrom by any one, except the judges of the court.

Clerk to have charge.

RULE VIII—*Return to Writs of Error, etc.*

(1) The clerk of the court to which any writ of error shall be directed may make return of the same by transmitting a true copy of the record and of all proceedings in the cause, under his hand and the seal of the court.

Clerk of court below to send up copy of record.

(2) No cause will be hereafter heard until a complete record, containing in itself, without references *aliunde* all the papers, exhibits, depositions, and other proceedings which are necessary to the hearing in this court, shall be filed.

Case heard only on complete record.

(3) Whenever it shall be necessary or proper, in the opinion of the presiding judge in any Circuit Court, or District Court exercising Circuit Court jurisdiction, that original papers of any kind

Original papers.—When to be sent up.

should be inspected in the Supreme Court upon appeal, such presiding judge may make such rule or order for the safe keeping, transporting, and return of such original papers as to him may seem proper, and this court will receive and consider such original papers in connection with the transcript of the proceedings.

RULE IX—*Docketing Cases*

(1) In all cases where a writ of error or an appeal shall be brought to this court from any judgment or decree rendered thirty days before the commencement of the term, it shall be the duty of the plaintiff in error or appellant, as the case may be, to docket the cause and file the record thereof with the clerk of this court within the first six days of the term; and if the writ of error or appeal shall be brought from a judgment or decree rendered less than thirty days before the commencement of the term, it shall be the duty of the plaintiff in error or appellant to docket the cause and file the record thereof with the clerk of this court within the first thirty days of the term; and if the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the case docketed and dismissed upon producing a certificate from the clerk of the court wherein the judgment or decree was rendered, stating the cause, and certifying that such writ of error or appeal has been duly sued out and allowed. And in no case shall the plaintiff in error or appellant be entitled to docket the cause and file the record after the same shall have been docketed and dismissed under this rule, unless by order of the court.

(2) But the defendant in error or appellee may, at his option, docket the cause and file a copy of the record with the clerk of the court; and, if the case is docketed and a copy of the record filed with the clerk of this court by the plaintiff in error or appellant within the periods of time above limited and prescribed by this rule, or by the defendant in error or appellee at any time thereafter, the case shall stand for argument.

When decree or judgment rendered 30 days before next term, case to be docketed and record filed during first six days; in default, defendant may have case docketed and dismissed.

Defendant may docket the case and file the record.

(3) In all cases where the period of thirty days is mentioned in this rule, it shall be extended Time prolonged for certain States and Territories. to sixty days in writs of error and appeals from California, Oregon, Nevada, Washington, New Mexico, and Utah.

RULE X—Security for Costs—Printing Records—Attachment for Costs

(1) In all cases the clerk shall take of the party a bond, with competent surety to secure his fees, Security for clerk's costs to be given. in the penalty of two hundred dollars, or a deposit of that amount, to be placed in bank subject to his draft.

(2) In all cases the clerk shall have fifteen copies of the record printed for the court; and the cost of printing shall be charged to the Government, in the expenses of the court. Fifteen copies of record to be printed for court and cost charged to Government.

(3) The clerk shall furnish copies for the printer, shall supervise the printing, and shall take care of and distribute the printed copies to the judges, the reporter, and the parties, from time to time as required. Clerk to furnish copies of record to printer, and supervise the printing.

(4) In each case the clerk shall charge the parties the legal fees for but the one manuscript copy in that case. Clerk to charge for one manuscript copy.

(5) In all cases the clerk shall deliver a copy of the printed record to each party. And in cases of dismissal, reversal, or affirmance with costs, the fees for the said manuscript copy of the record shall be taxed against the party against whom costs are given, and which charge includes the charge for the copy furnished him. Clerk to furnish one copy of record to each party.—Fees to be charged.

(6) In cases of dismissal for want of jurisdiction, each party shall be charged with one-half of the legal fees for a copy. Charges in case of dismissal for want of jurisdiction.

(7) Upon the clerk of this court producing satisfactory evidence by affidavit or the acknowledgment of the parties or their sureties, of having served a copy of the bill of fees due by them respec- Attachment may issue for clerk's fees.

should be inspected in the Supreme Court upon appeal, such presiding judge may make such rule or order for the safe keeping, transporting, and return of such original papers as to him may seem proper, and this court will receive and consider such original papers in connection with the transcript of the proceedings.

RULE IX—*Docketing Cases*

(1) In all cases where a writ of error or an appeal shall be brought to this court from any judgment or decree rendered thirty days before the commencement of the term, it shall be the duty of the plaintiff in error or appellant, as the case may be, to docket the cause and file the record thereof with the clerk of this court within the first six days of the term; and if the writ of error or appeal shall be brought from a judgment or decree rendered less than thirty days before the commencement of the term, it shall be the duty of the plaintiff in error or appellant to docket the cause and file the record thereof with the clerk of this court within the first thirty days of the term; and if the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the case docketed and dismissed upon producing a certificate from the clerk of the court wherein the judgment or decree was rendered, stating the cause, and certifying that such writ of error or appeal has been duly sued out and allowed. And in no case shall the plaintiff in error or appellant be entitled to docket the cause and file the record after the same shall have been docketed and dismissed under this rule, unless by order of the court.

(2) But the defendant in error or appellee may, at his option, docket the cause and file a copy of the record with the clerk of the court; and, if the case is docketed and a copy of the record filed with the clerk of this court by the plaintiff in error or appellant within the periods of time above limited and prescribed by this rule, or by the defendant in error or appellee at any time thereafter, the case shall stand for argument.

When decree or judgment rendered 30 days before next term, case to be docketed and record filed during first six days; in default, defendant may have case docketed and dismissed.

Defendant may docket the case and file the record.

(3) In all cases where the period of thirty days is mentioned in this rule, it shall be extended to sixty days in writs of error and appeals from California, Oregon, Nevada, Washington, New Mexico, and Utah.

Time prolonged for certain States and Territories.

RULE X—Security for Costs—Printing Records—Attachment for Costs

(1) In all cases the clerk shall take of the party a bond, with competent surety to secure his fees, in the penalty of two hundred dollars, or a deposit of that amount, to be placed in bank subject to his draft.

Security for clerk's costs to be given.

(2) In all cases the clerk shall have fifteen copies of the record printed for the court; and the cost of printing shall be charged to the Government, in the expenses of the court.

Fifteen copies of record to be printed for court and cost charged to Government.

(3) The clerk shall furnish copies for the printer, shall supervise the printing, and shall take care of and distribute the printed copies to the judges, the reporter, and the parties, from time to time as required.

Clerk to furnish copies of record to printer, and supervise the printing.

(4) In each case the clerk shall charge the parties the legal fees for but the one manuscript copy in that case.

Clerk to charge for one manuscript copy.

(5) In all cases the clerk shall deliver a copy of the printed record to each party. And in cases of dismissal, reversal, or affirmance with costs, the fees for the said manuscript copy of the record shall be taxed against the party against whom costs are given, and which charge includes the charge for the copy furnished him.

Clerk to furnish one copy of record to each party.— Fees to be charged.

(6) In cases of dismissal for want of jurisdiction, each party shall be charged with one-half of the legal fees for a copy.

Charges in case of dismissal for want of jurisdiction.

(7) Upon the clerk of this court producing satisfactory evidence by affidavit or the acknowledgment of the parties or their sureties, of having served a copy of the bill of fees due by them respec-

Attachment may issue for clerk's fees.

tively in this court, on such parties or their sureties, an attachment shall issue against such parties or sureties, respectively, to compel the payment of said fees.

RULE XI—*Translations*

Whenever any record transmitted to this court upon a writ of error or appeal shall contain any document, paper, testimony, or other proceedings in a foreign language, and the record does not also contain a translation of such document, paper, testimony, or other proceeding, made under the authority of the inferior court, or admitted to be correct, the record shall not be printed; but the case shall be reported to this court by the clerk, and the court will thereupon remand it to the inferior court, in order that a translation may be there supplied and inserted in the record.

Translations to be sent up, or cause will be remanded for insertion in record.

RULE XII—*Evidence*

(1) In all cases where further proof is ordered by the court, the depositions which may be taken shall be by a commission, to be issued from this court, or from any Circuit Court of the United States.

Further proof; when ordered to be by commission.

(2) In all cases of admiralty and maritime jurisdiction, where new evidence shall be admissible in this court, the evidence by testimony of witnesses shall be taken under a commission to be issued from this court, or from any Circuit Court of the United States, under the direction of any judge thereof; and no such commission shall issue but upon interrogatories, to be filed by the party applying for the commission, and notice to the opposite party or his agent or attorney, accompanied with a copy of the interrogatories so filed, to file cross-interrogatories within twenty days from the service of such notice: *Provided, however,* that nothing in this rule shall prevent any party from giving oral testimony in open court in cases where by law it is admissible.

In admiralty causes, commission will issue only on interrogatories.

RULE XIII—*Deeds, etc., not Objected to, etc., Admitted*

In all cases of equity or admiralty jurisdiction, heard in this court, no objection shall here-
after be allowed to be taken to the ad-
missibility of any deposition, deed, grant,
or other exhibit found in the record as evidence, unless
objection was taken thereto in the court below and entered
of record; but the same shall otherwise be deemed to have
been admitted by consent.

In equity and admiralty causes objections to evidence not entered of record in court below, not considered.

RULE XIV—*Certiorari*

No *certiorari* for diminution of the record shall be here-
after awarded in any cause unless a
motion therefor shall be made in writing,
and the facts on which the same is
founded shall, if not admitted by the other party, be verified
by affidavit. And all motions for such *certiorari* shall be
made at the first term of the entry of the cause, otherwise
the same shall not be granted unless upon special cause
shown in the court, accounting satisfactorily for the delay.

Motions for certiorari for diminution of the record must be at the first term, in writing, and verified.

RULE XV—*Death of a Party*

(1) Whenever, pending a writ of error or appeal in this
court, either party shall die, the proper
representatives in the personalty or realty
of the deceased party, according to
the nature of the case, may voluntarily
come in and be admitted parties to the suit, and thereupon
the cause shall be heard and determined as in other cases;
and if such representatives shall not voluntarily become
parties, then the other party may suggest the death on the
record, and thereupon, on motion, obtain an order that
unless such representatives shall become parties within the
first ten days of the ensuing term, the party moving for
such order, if defendant in error, shall be entitled to have
the writ of error or appeal dismissed; and if the party so
moving shall be plaintiff in error, he shall be entitled to
open the record, and on hearing have the same reversed,

In suits abated by death, legal representative may be made party.—The other party may require revival or dismissal.

tively in this court, on such parties or their sureties, an attachment shall issue against such parties or sureties, respectively, to compel the payment of said fees.

RULE XI—*Translations*

Whenever any record transmitted to this court upon a writ of error or appeal shall contain any document, paper, testimony, or other proceedings in a foreign language, and the record does not also contain a translation of such document, paper, testimony, or other proceeding, made under the authority of the inferior court, or admitted to be correct, the record shall not be printed; but the case shall be reported to this court by the clerk, and the court will thereupon remand it to the inferior court, in order that a translation may be there supplied and inserted in the record.

Translations to be sent up, or cause will be remanded for insertion in record.

RULE XII—*Evidence*

(1) In all cases where further proof is ordered by the court, the depositions which may be taken shall be by a commission, to be issued from this court, or from any Circuit Court of the United States.

Further proof; when ordered to be by commission.

(2) In all cases of admiralty and maritime jurisdiction, where new evidence shall be admissible in this court, the evidence by testimony of witnesses shall be taken under a commission to be issued from this court, or from any Circuit Court of the United States, under the direction of any judge thereof; and no such commission shall issue but upon interrogatories, to be filed by the party applying for the commission, and notice to the opposite party or his agent or attorney, accompanied with a copy of the interrogatories so filed, to file cross-interrogatories within twenty days from the service of such notice: *Provided, however,* that nothing in this rule shall prevent any party from giving oral testimony in open court in cases where by law it is admissible.

In admiralty causes, commission will issue only on interrogatories.

RULE XIII—*Deeds, etc., not Objected to, etc., Admitted*

In all cases of equity or admiralty jurisdiction, heard in this court, no objection shall hereafter be allowed to be taken to the admissibility of any deposition, deed, grant, or other exhibit found in the record as evidence, unless objection was taken thereto in the court below and entered of record; but the same shall otherwise be deemed to have been admitted by consent.

In equity and admiralty causes objections to evidence not entered of record in court below, not considered.

RULE XIV—*Certiorari*

No *certiorari* for diminution of the record shall be hereafter awarded in any cause unless a motion therefor shall be made in writing, and the facts on which the same is founded shall, if not admitted by the other party, be verified by affidavit. And all motions for such *certiorari* shall be made at the first term of the entry of the cause, otherwise the same shall not be granted unless upon special cause shown in the court, accounting satisfactorily for the delay.

Motions for certiorari for diminution of the record must be at the first term, in writing, and verified.

RULE XV—*Death of a Party*

(1) Whenever, pending a writ of error or appeal in this court, either party shall die, the proper representatives in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the suit, and thereupon the cause shall be heard and determined as in other cases; and if such representatives shall not voluntarily become parties, then the other party may suggest the death on the record, and thereupon, on motion, obtain an order that unless such representatives shall become parties within the first ten days of the ensuing term, the party moving for such order, if defendant in error, shall be entitled to have the writ of error or appeal dismissed; and if the party so moving shall be plaintiff in error, he shall be entitled to open the record, and on hearing have the same reversed,

In suits abated by death, legal representative may be made party.—The other party may require revival or dismissal.

if it be erroneous: *Provided, however,* that a copy of every such order shall be printed in some newspaper at the seat of Government in which the laws of the United States shall be printed by authority for three successive weeks, at least sixty days before the beginning of the term of the Supreme Court then next ensuing.

(2) When the death of a party is suggested, and the representatives of the deceased do not appear by the tenth day of the second term next ensuing the suggestion, and no measures are taken by the opposite party within that time to compel their appearance, the case shall abate.

No action of either party, after suggestion of death; case abates by tenth day of next term.

RULE XVI—*No Appearance of Plaintiff in Error*

Where there is no appearance of the plaintiff in error when the case is called for trial, the defendant may have the plaintiff called, and dismiss the writ of error, or may open the record, and pray for an affirmance.

Case dismissed if, when called, no appearance or brief for plaintiff.

RULE XVII—*No Appearance of Defendant in Error*

Where the defendant in error fails to appear when the cause shall be called for trial, the court may proceed to hear an argument on the part of the plaintiff, and to give judgment according to the right of the cause.

Argument heard on part of plaintiff, when case called, even if defendant fails to appear.

RULE XVIII—*No Appearance of Either Party*

When a cause is reached in the regular call of the docket, and no appearance is entered for either party, the case shall be dismissed at the costs of the plaintiff.

No appearance for either party.

RULE XIX—*Neither Party Ready at Second Term*

When a case is called for argument at two successive terms, and upon the call at the second term neither party is prepared to argue it, it shall be dismissed at the costs of the plaintiff, unless sufficient cause is shown for further postponement.

Cases called at two successive terms, when dismissed.

RULE XX—*Printed Arguments*

(1) In all cases brought here on appeal, writ of error or otherwise, the court shall receive printed arguments, without regard to the number of the case on the docket, if the counsel on both sides shall choose so to submit the same. But the arguments must be filed within the first ten days of the term, and signed by attorneys or counsellors of this court.

Cases may be submitted on printed briefs without argument.

(2) When a case is reached in the regular call of the docket, and a printed argument shall be filed for one or both parties, the case shall stand on the same footing as if it were an appearance by counsel.

Filing brief equivalent to appearance.

(3) When a case is taken up for trial upon the regular call of the docket, and argued orally in behalf of only one of the parties, no printed argument will be received unless it is filed before the oral argument begins, and the court will proceed to consider and decide the case upon the *ex parte* argument.

Briefs must be filed before case orally argued by the other party.

RULE XXI—*Two Counsel—Two Hours—Briefs*

(1) Only two counsel will be permitted to argue for each party, plaintiff and defendant in a cause.

Only two counsel heard on each side.

(2) No counsel will be permitted to speak in an argument of any case more than two hours, without the special leave of the court, granted before the argument begins.

Counsel may consume two hours.

(3) Counsel will not be heard unless a printed brief or abstract of the case be filed, together with the points intended to be made, and the authorities intended to be cited in support of them arranged under the respective points; and no other book or case be referred to in the argument.

Counsel heard only when printed brief is filed.

(4) The same shall be signed by an attorney or counsellor of this court.

Brief to be signed by attorney.

(5) If one of the parties omits to file such a statement, he cannot be heard and the case will be heard *ex parte* upon the argument of the party by whom the statement is filed.

In default of a brief filed, case will proceed *ex parte*.

if it be erroneous: *Provided, however,* that a copy of every such order shall be printed in some newspaper at the seat of Government in which the laws of the United States shall be printed by authority for three successive weeks, at least sixty days before the beginning of the term of the Supreme Court then next ensuing.

(2) When the death of a party is suggested, and the representatives of the deceased do not appear by the tenth day of the second term next ensuing the suggestion, and no measures are taken by the opposite party within that time to compel their appearance, the case shall abate.

No action of either party, after suggestion of death; case abates by tenth day of next term.

RULE XVI—*No Appearance of Plaintiff in Error*

Where there is no appearance of the plaintiff in error when the case is called for trial, the defendant may have the plaintiff called, and dismiss the writ of error, or may open the record, and pray for an affirmance.

Case dismissed if, when called, no appearance or brief for plaintiff.

RULE XVII—*No Appearance of Defendant in Error*

Where the defendant in error fails to appear when the cause shall be called for trial, the court may proceed to hear an argument on the part of the plaintiff, and to give judgment according to the right of the cause.

Argument heard on part of plaintiff, when case called, even if defendant fails to appear.

RULE XVIII—*No Appearance of Either Party*

When a cause is reached in the regular call of the docket, and no appearance is entered for either party, the case shall be dismissed at the costs of the plaintiff.

No appearance for either party.

RULE XIX—*Neither Party Ready at Second Term*

When a case is called for argument at two successive terms, and upon the call at the second term neither party is prepared to argue it, it shall be dismissed at the costs of the plaintiff, unless sufficient cause is shown for further postponement.

Cases called at two successive terms, when dismissed.

RULE XX—*Printed Arguments*

(1) In all cases brought here on appeal, writ of error or otherwise, the court shall receive printed arguments, without regard to the number of the case on the docket, if the counsel on both sides shall choose so to submit the same. But the arguments must be filed within the first ten days of the term, and signed by attorneys or counsellors of this court.

Cases may be submitted on printed briefs without argument.

(2) When a case is reached in the regular call of the docket, and a printed argument shall be filed for one or both parties, the case shall stand on the same footing as if it were an appearance by counsel.

Filing brief equivalent to appearance.

(3) When a case is taken up for trial upon the regular call of the docket, and argued orally in behalf of only one of the parties, no printed argument will be received unless it is filed before the oral argument begins, and the court will proceed to consider and decide the case upon the *ex parte* argument.

Briefs must be filed before case orally argued by the other party.

RULE XXI—*Two Counsel—Two Hours—Briefs*

(1) Only two counsel will be permitted to argue for each party, plaintiff and defendant in a cause.

Only two counsel heard on each side.

(2) No counsel will be permitted to speak in an argument of any case more than two hours, without the special leave of the court, granted before the argument begins.

Counsel may consume two hours.

(3) Counsel will not be heard unless a printed brief or abstract of the case be filed, together with the points intended to be made, and the authorities intended to be cited in support of them arranged under the respective points; and no other book or case be referred to in the argument.

Counsel heard only when printed brief is filed.

(4) The same shall be signed by an attorney or counsellor of this court.

Brief to be signed by attorney.

(5) If one of the parties omits to file such a statement, he cannot be heard and the case will be heard *ex parte* upon the argument of the party by whom the statement is filed.

In default of a brief filed, case will proceed *ex parte*.

(6) Fifteen printed copies of the abstracts, points, and authorities, required by this rule, shall be filed with the clerk three days before the cause is called for argument; nine of these copies for the court, one for the reporter, one to be retained by the clerk, and the residue for counsel.

(7) When no counsel appears for one of the parties, and no printed brief or argument is filed, only one counsel will be heard for the adverse party. But if a printed brief or argument is filed, the adverse party may be entitled to be heard by two counsel.

Rule 21 as later amended read as follows.

RULE 21

Two Counsel

1. Only two counsel shall be permitted to argue for each party, plaintiff and defendant, in a cause.

Two Hours

2. Two hours on each side shall be allowed in the argument of a cause, and no more, without special leave of the court granted before the argument begins. But the time thus allowed may be apportioned among counsel on the same side as they choose: *Provided always*, a fair opening of the case shall be made by the party having the opening and closing argument.

Briefs

3. Counsel will not be heard unless a printed brief or abstract of the case be first filed, together with the points made, and the authorities cited in support of them, arranged under the respective points.

4. The brief filed on behalf of a plaintiff in error or an appellant shall also contain a statement of the errors relied upon, and in case of an appeal an abstract of the pleadings and proofs, exhibiting clearly and succinctly the issues presented.

5. Each error shall be separately alleged and particularly specified: otherwise it will be disregarded.

6. When the error alleged is to the charge of the court, the part of the charge referred to shall be quoted *totidem verbis* in the specification.

7. When the error alleged is to the admission or rejection of evidence, the specification shall quote the full substance of the evidence offered, or copy the offer as stated in the bill of exceptions. Any alleged error not in accordance with these rules will be disregarded.

8. Counsel will be confined to a discussion of the errors stated, but the court may, at its discretion, notice any other errors appearing in the record.

9. The same shall be signed by an attorney or counsellor of this court.

10. If one of the parties omits to file such a statement, he cannot be heard, and the case will be heard *ex parte* upon the argument of the party by whom the statement is filed.

11. Twenty printed copies of the abstract, points, and authorities required by this rule shall be filed with the clerk by the plaintiff in error or appellant six days, and by the defendant in error or appellee three days, before the case is called for argument.

12. When no counsel appears for one of the parties, and no printed brief or argument is filed, only one counsel will be heard for the adverse party; but if a printed brief or argument is filed, the adverse party will be entitled to be heard by two counsel.

Promulgated May 21, 1871. 11 Wall. ix.

Amended Nov. 16, 1872. 14 Wall. xi.

RULE XXII—*Order of Argument*

The plaintiff or appellant in this court shall be entitled to open and conclude the case. But Plaintiff to open and close case.—On cross-ap-peals plaintiff in court below to open and close. when there are cross-ap-peals, they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument.

RULE XXIII—*Interest, etc.*

(1) In cases where a writ of error is prosecuted to the Supreme Court, and the judgment of the inferior court is affirmed, the interest shall be calculated and levied from the date of the judgment below, until the same is paid, at the same rate that similar judgments bear interest in the courts of the State where such judgment is rendered.

On affirmance, interest given from date of judgment below and at same rate as in State where judgment rendered.

(2) The same rule shall be applied to decrees for the payment of money in cases in chancery, unless otherwise ordered by this court.

Same rule to apply in chancery decrees.

(3) In all cases where a writ of error shall delay the proceedings on the judgment in the Circuit Court and shall appear to have been sued out merely for delay, damages shall be awarded, at the rate of *ten per centum per annum* on the amount of the judgment; and the damages shall be calculated from the date of the judgment in the court below until the money is paid.

Not exceeding ten per cent damages on appeals for delay.—How to calculate.

RULE XXIV—*Costs*

(1) In all cases where any suit shall be dismissed in this court, except where the dismissal shall be for want of jurisdiction, costs shall be allowed for the defendant in error or appellee, unless otherwise agreed by the parties.

On dismissal, costs to defendant in error, except dismissal for want of jurisdiction.

(2) In all cases of affirmance of any judgment or decree in this court, costs shall be allowed to the defendant in error or appellee, unless otherwise ordered by the court.

On affirmance, costs to defendant in error.

(3) In all cases of reversals of any judgment or decree in this court, costs shall be allowed in this court for the plaintiff in error or appellant, as the case may be, unless otherwise ordered by the court.

On reversal, costs to plaintiff in error.

(4) Neither of the foregoing sections shall apply to cases where the United States are a party; but in such cases no costs shall be allowed in this court for or against the United States.

Clauses two and three not to apply when United States a party.

(5) In all cases of the dismissal of any suit in this court, it shall be the duty of the clerk to issue a mandate, or other proper process, in the nature of a *procedendo*, to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain.

On dismissal, a *procedendo* goes to court below.

(6) When costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below, and annex to the same the bill of items taxed in detail.

Costs to be inserted in the mandate and bill of costs annexed.

RULE XXV—*Opinions of the Court*

(1) All opinions delivered by the court shall immediately upon the delivery thereof be delivered over to the clerk to be recorded. And it shall be the duty of the clerk to cause the same to be forthwith recorded and to deliver the originals, with a transcript of the judgment or decree of the court thereon, to the reporter as soon as the same shall be recorded.

Opinions to be recorded and delivered to reporter.

(2) And all the opinions of the court, as far as practicable, shall be recorded during the term, so that the publication of the reports may not be delayed thereby.

Opinions to be recorded during term.

(3) The original opinions of the court delivered to the reporter shall be filed in the office of the clerk of the court, for preservation, as soon as the volume of reports for the term at which they are delivered shall be published.

Opinions to be preserved.

RULE XXVI—*Call of the Docket*

(1) The court, on the second day in each term, will commence calling the cases for argument in the order in which they stand on the docket, and proceed from day to day during the term in the same order; and if the parties, or either of them, shall be ready when the case is called, the same shall be heard,

Docket called in order from second day of term.—If neither party ready, case goes to foot of docket.—Ten cases called daily.—No case to be taken up out of order—except.

and if neither party shall be ready to proceed in the argument, the case shall go down to the foot of the docket, unless some good and satisfactory reason to the contrary shall be shown to the court.

That ten causes only shall be considered as liable to be called on each day during the term, including the one under argument, if the same shall not be concluded on the preceding day. No cause shall be taken up out of the order on the docket or be set down for any particular day, except under special and peculiar circumstances, to be shown to the court. Every cause which shall have been called in its order and passed, and put at the foot of the docket, shall, if not again reached during the term it was called, be continued to the next term of the court.

RULE XXVII—*Motion-day*

The court will not hear arguments on Saturday (unless for special cause it shall order to the contrary), but will devote that day to the other business of the court; and on Friday in each week, during the sitting of the court, motions in cases not required by the rules of the court to be put on the docket shall be entitled to preference, if such motions shall be made before the court shall have entered upon the hearing of a cause upon the docket.

Arguments not heard on Saturday—except; what motions entitled to preference on Friday.

RULE XXVIII—*Adjournment*

The court will at every session announce on what day it will adjourn at least ten days before the time which shall be fixed upon; the court will take up no case for argument nor receive any case upon printed briefs, within three days next before the day fixed upon for adjournment.

Adjournment announced ten days before end of session.

RULE XXIX—*Dismissing Cases in Vacation*

Whenever the plaintiff and defendant in a writ of error pending in this court, or the appellant and appellee in any appeal, shall, at any time hereafter in vacation and out of term time, by their

Case may be dismissed in vacation, upon agreement.

respective attorneys, who are entered as such on the record, sign and file with the clerk an agreement in writing, directing the case to be dismissed and specifying the terms upon which it is to be dismissed as to costs, and also paying to the clerk any fees that may be due to him, it shall be the duty of the clerk to enter the case dismissed, and to give to either party who may request it a copy of the agreement filed; but no mandate or other process is to be issued without an order by the court.

RULE XXX—*Certain Cases Advanced—Cases Heard Together*

That all cases on the calendar, except cases advanced as hereinafter provided, shall be heard when reached in the regular call of the docket, and in the order in which they are entered.

Criminal cases may be advanced by leave of the court, on motion of either party.

Revenue cases, and cases in which the United States are concerned, which also involve or affect some matter of general public interest, may also, by leave of the court, be advanced on motion of the attorney-general.

Two or more cases, also, involving the same question, may by leave of the court, be heard together, but they must be argued as one case.

December Term, 1866. 4 Wall. vii.

RULE XXXI—*Appearance—Notice of Motion*

Ordered, That when the filing of the transcript of a record brought up by writ of error or appeal, the appearance of the counsel of the plaintiff in error or appellant shall be entered, no motion to dismiss, except on special assignment by the court, shall be heard, unless previous notice has been given to the adverse party, or the counsel or attorney of such party.

December Term, 1867. 6 Wall. v.

RULE XXXII—*Supersedeas*

Supersedeas bonds in the Circuit Courts must be taken with good and sufficient security, that the plaintiff in error or

appellant shall prosecute his writ or appeal to effect and answer all damages and costs if he fail to make his plea good. Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree including "just damages for delay" and costs and interest on the appeal; but in all suits where the property in controversy necessarily follows the event of the suit, as in real actions, replevin, and in suits on mortgages; or where the property is in the custody of the marshal, under admiralty process, as in case of capture or seizure, or where the proceeds thereof, or a bond for the value thereof, is in the custody or control of the court, indemnity in all such cases is only required in an amount sufficient to secure the sum recovered for the use or detention of the property, and the costs of the suit, and "just damages for delay" and costs and interest on the appeal.

December Term, 1867. 6 *Wall.* v.

RULE XXXIII—*Writ of Error*

In cases where final judgment is rendered more than thirty days before the first day of the next term of this court, the writ of error and citation, if taken before, must be returnable on the first day of said term, and be served before that day; but in cases where the judgment is rendered less than thirty days before the first day, the writ of error and citation may be made returnable on the third Monday of the said term, and be served before that day.

December Term, 1867. 6 *Wall.* vi.

RULE XXXIV

In cases where appeals of the character mentioned in Rule 93 regulating equity practice, have already been taken, this court will, after the cause has been docketed, entertain an application for a suspension or modification of the injunction based upon a statement of the facts affecting the application by a justice or judge who took part in the decision. All such applications must be printed and submitted on briefs. No oral arguments will be heard, unless specially ordered.

Promulgated Jan. 13, 1879, as Rule 30. 97 *U. S.* vii.

RULE XXXV

All records and arguments printed for the use of the court must be in such form and size that they can be conveniently cut and bound so as to make an ordinary octavo volume. After the first day of October, 1880, the clerk will not receive or file records or arguments intended for distribution to the judges that do not conform to the requirements of this rule.

Promulgated Dec. 1, 1879, as Rule 31. 100 *U. S.* ix.

JURISDICTION OF THE SUPREME COURT

Decisions

The need of a tribunal to finally pass upon all laws enacted by Congress and the several States to secure uniformity, with the reason why Federal Courts were established stated, with a review of the constitution as adopted. *Dodge v. Woolsey*, 18 *How.* 331, 15 L. ed. 407.

The cases in which the appellate jurisdiction of the Supreme Court can be exercised depend upon the regulation of Congress. *Forsythe v. United States*, 9 *How.* 571-572, 13 L. ed. 262.

The jurisdiction of the Supreme Court has been regulated by Congress, and an affirmative description of its powers (in an act of Congress) must be understood as a regulation under the constitution, prohibiting the exercise of other powers than those described. Marshall, C. J., in *United States v. More*, 3 *Cranch*, 159-173, 2 L. ed. 402.

All cases embraced within the judicial power of the government are capable of being acted upon by the courts of the union. Those on which the original jurisdiction of the Supreme Court can be exercised are defined and cannot be enlarged. Mr. Justice Baldwin, dissenting opinion in *Ex parte Crane*, 5 *Pet.* 202, 8 L. ed. 97.

The original jurisdiction of the Supreme Court does not extend to a suit where a State is plaintiff and citizens of the same State and citizens of another State are defendants. *California v. Southern Pacific Ry. Co.*, 157 *U. S.* 229-261, 39 L. ed. 695.

The Supreme Court has jurisdiction to issue a writ of error to a subordinate State court when that court is the highest court of the State in which a decision in the case can be had. *Bacon v. State of Texas*, 163 *U. S.* 207-215, 41 L. ed. 135, Oct. T., 1895.

The court has no power to entertain a bill sought to be filed by a State to restrain the President by injunction from carrying into effect an Act of Congress alleged to be unconstitutional, though his acts when performed are in proper cases, subject to judicial cognizance. *Mississippi v. Johnson*, 4 *Wall.* 475-502, 18 L. ed. 441, Dec. T., 1866.

A bill praying an injunction against the execution of an Act of Congress by the incumbent of the presidential office cannot be received, whether it describes him as President, or as a citizen of his State. *Ib.* 502.

The appellate power of the Supreme Court under the Constitution extends to all cases within the judicial power of the United States, but actual jurisdiction under the power is confined within such limits as Congress sees fit to prescribe. *Duncan v. The Francis Wright*, 105 *U. S.* 381-385, 26 *L. ed.* 1101, Oct. T., 1881.

The Supreme Court has jurisdiction to issue certiorari to the Circuit Court of Appeals under sec. 716, *Rev. Stats. (U. S. Comp. Stats., 1901, Vol. 1, p. 580, sec. 262, Judicial Code)*. This power was not limited by the Act of March 3, 1891, establishing the Circuit Court of Appeals and prescribing the issuance of writs of certiorari to that court in certain causes. *McClellan v. Garland*, 217 *U. S.* 268-277, 54 *L. ed.* 765.

Writ issued in a cause of original application to the Circuit Court of Appeals for mandamus against a district Judge, to proceed in a cause in the Circuit Court in which jurisdiction did not depend on citizenship, so that the judgment of the Circuit Court of Appeals was not final in the mandamus cause. *Ib.*

Held, upon an appeal under sec. 7 of the Act of Mar. 3, 1891 (sec. 129, *Judicial Code*), the Circuit Court of Appeals might decide the case on its merits and render or direct a final decree, but if its decree is not final no appeal lies to the Supreme Court.

No Act of Congress has conferred on the Supreme Court authority to review by appeal an interlocutory order or decree of the Circuit Court of Appeals. A decree of the Circuit Court of Appeals had on an appeal from an interlocutory order under the Act of Feb. 18, 1895 (amended April 14, 1906), granting or continuing an injunction or appointing a receiver, is not reviewable by appeal. *Kirwin v. Murphy*, 170 *U. S.* 205-210, 42 *L. ed.* 1011, Oct. T., 1897.

Under the Act of 1891 (sec. 238, *Judicial Code*), appeals can only be taken directly to the Supreme Court where the jurisdiction of the District Court is in issue, in prize cases, constitutional cases, and cases involving the validity or construction of a treaty. *Given v. United States*, 184 *U. S.* 669, 46 *L. ed.* 741.

The validity of a statute or an authority exercised under the United States (sec. 237, *Judicial Code*), is drawn in question when the existence or constitutionality or legality of such statute or authority is denied and the denial forms the subject of direct inquiry. *United States v. Lynch*, 137 *U. S.* 280, 34 *L. ed.* 702.

The Criminal Appeals Act of March 2, 1907, was not repealed by the *Judicial Code* of March 3, 1911 (36 *Stat. L.* 1087, chap. 231, *U. S.*

Compiled Stats. Sup. 1911, p. 128), since it is not included in the statutes repealed by sec. 297 of the *Code*. *United States v. Winslow*, 227 *U. S.* p. 202, 57 L. ed. 485.

The Act of 1891 (sec. 238, Judicial Code) nowhere imposes a pecuniary limit upon the appellate jurisdiction of the Supreme Court from a District Court. The only pecuniary limit is one of \$1,000 upon the appeal to the Supreme Court of a case which has been once decided on appeal in the Circuit Court of Appeals, and in which the judgment of that court is not made final. (Sec. 241, Judicial Code.) *The Paquette Habana*, 175 *U. S.* 677-684, 44 L. ed. 322.

Where the amount of damages did not appear from the bill or otherwise, and the court could not see how damages could be sustained, and no other ground of jurisdiction appeared, the court held it had no jurisdiction under the statutes then existing regulating the practice of the Supreme Court. *Lownsdale v. Parrish*, 21 *How.* 290, 16 L. ed. 81.

In cases where the decree or judgment of the Circuit Court of Appeals is made final by the statute the Supreme Court may require the same by "certiorari or otherwise" to be certified to it for review. (Sec. 240, Judicial Code.) The words "or otherwise" add nothing to the power of the Supreme Court. *Huguley Mfg. Co. v. Galetton Cotton Mills*, 184 *U. S.* 290-295, 46 L. ed. 549.

The judgments and decrees of the Circuit Court of Appeals are made final by sec. 6, Act 1891 (sec. 128, Judicial Code) in all cases in which the jurisdiction is dependent entirely on diversity of citizenship; that is the jurisdiction of the District Court as originally invoked. If after the jurisdiction of the District Court attaches on the ground of diversity of citizenship issues are raised the decision of which brings the case within either of the classes set forth in sec. 5 of the Act of 1891 (sec. 238, Judicial Code) then the case may be brought directly to the Supreme Court, although it may be carried to the Circuit Court of Appeals, in which event the final decree or judgment of that court cannot be brought to the Supreme Court as of right.

If the jurisdiction of the District Court rests solely on the ground that the suit arises under the Constitution, laws or treaties of the United States, then the jurisdiction of the Supreme Court to review is exclusive, but if it is placed on diverse citizenship, and also on grounds independent of that, then, if carried to the Court of Appeals, the decision of that court will not be final, and appeal or writ of error to the Supreme Court will lie. *Ib.* 295.

The general intention of the Act of March 3, 1891, was to permit an appeal to only one court. *Ib.* 295, 46 L. ed. 548.

If an appeal be taken to the Circuit Court of Appeals and the record shows the trial court was without jurisdiction the decree of the Circuit

Court of Appeals can be reviewed only upon a certiorari from the Supreme Court. *Ib.* 296.

When the jurisdiction of the Circuit (District) Court is involved solely on the ground of diversity of citizenship two classes of cases can arise; one in which the questions expressed in sec. 5 of the Act of 1891 (sec. 238, Judicial Code) appear in the course of the proceeding and one in which other Federal questions appear. Cases of the first class may be taken to the Circuit Court of Appeals or to the Supreme Court. If taken to the Circuit Court of Appeals its judgment is final. Cases of the second class must be taken to the Circuit Court of Appeals and its judgment will be final. *Ayers v. Polsdorfer*, 187 *U. S.* 590, 47 L. ed. 315-316.

The line of division between cases appealable to the Supreme Court from the Circuit Court of Appeals and those not so appealable is determined by the source of jurisdiction of the trial court, whether jurisdiction of that court rested upon the character of the parties or the nature of the case. *McFadden v. United States*, 213 *U. S.* 288-294, 53 L. ed. 802.

The rule is inflexible that in the exercise of its appellate powers the Supreme Court will deny jurisdiction of all cases where such jurisdiction does not affirmatively appear in the record upon which it is called to act. *Colorado Central, etc., Co. v. Turk*, 150 *U. S.* 143, 37 L. ed. 1032.

PRACTICE OF THE SUPREME COURT

Decisions

As to the mode of exercising appellate jurisdiction prescribed by Congress nothing can be disregarded as being technical. *Edmonson v. Bloomshire*, 7 *Wall.* 306, 19 L. ed. 92.

It is not necessary that all the steps to give the Supreme Court jurisdiction should be on file in the court below, nor appear to be of record in that court. That citation was issued and served may be proved *aliunde*. *Hudgins v. Kemp*, 18 *How.* 530-539, 15 L. ed. 514.

The Supreme Court will take judicial notice of the records of the Executive Departments of the Government, and public documents emanating from its Legislative department though the same were not called to the attention of the trial court. *Jones v. United States*, 137 *U. S.* 202-214, 34 L. ed. 696; *N. Y. Indians v. United States*, 170 *U. S.* 1-32, 47 L. ed. 938.

Debates in Congress held not an appropriate source to learn the meaning of the language of an Act of Congress. *United States v. Trans-Missouri Freight Assn.*, 166 *U. S.* 318, 41 L. ed. 1020.

The reason of the rule is stated. *Ib.*

The court will consider reports of Committees of Congress as a guide to the true interpretation of a statute of that body. *Ocean Steam Nav. Co. v. Stranahan*, 214 *U. S.* 320-333, 43 L. ed. 1019.

Matters resting entirely in the discretion of the trial court are not re-examinable in the Supreme Court. *Pomeroy's Lessee v. Bank of Indiana*, 1 *Wall.* 592-598, 17 L. ed. 640, Dec. T., 1863.

The Supreme Court, being one of limited and special original jurisdiction, whenever its want or excess of power is objected to, or is apparent to the court it must cease its action. *Rhode Island v. Massachusetts*, 12 *Pet.* 657-720, 9 L. ed. 1258, Jan. T., 1838.

The rule that the party which puts in a plea which is the subject of discussion has the right to begin and conclude the argument, prevails in the United States courts in chancery proceedings. *Rhode Island v. Massachusetts*, 14 *Pet.* 210-216, 10 L. ed. 426, Jan. T., 1840.

In suits against a State process should be served both on the governor or chief executive, and the attorney-general of such State. *Grayson v. Virginia*, 3 *Dallas*, 320, 1 L. ed. 619, Feb. T., 1796.

In suits against a State if the State neglects to appear on due service of process, no coercive measures will be taken to compel appearance, but the complainant will be allowed to proceed *ex parte*. *Massachusetts v. Rhode Island*, 12 *Pet.* 755-761, 9 L. ed. 1274, Jan. T., 1838.

In suits between States the Supreme Court will not apply the rules as to time, which govern in suits between individuals: *Rhode Island v. Massachusetts*, 13 *Pet.* 23-24, 10 L. ed. 42, Jan. T., 1839.

In case of original equity jurisdiction, motion for leave to file a bill will be heard *ex parte* on the regular motion-day, and the court will require ten printed copies of the bill to be filed with the clerk before the hearing. *Georgia v. Grant*, 6 *Wall.* 241-242, 18 L. ed. 848, Dec. T., 1867.

In suits between individuals, the attorney-general may be heard when he suggests that the public interests are involved in the decision. *Florida v. Georgia*, 17 *How.* 478-490, 15 L. ed. 189, Dec. T., 1854.

A final judgment of the Supreme Court is conclusive upon the rights which it decides, and no statute has devised any process upon which it may revise its judgment. *Martin v. Hunter*, 1 *Wheat.* 304-355, 4 L. ed. 110, Feb. T., 1816.

Except in cases of fraud. *Magwire v. Tyler*, 17 *Wall.* 253-283, 21 L. ed. 583, Dec. T., 1872.

The court has no power after the term has passed, and a cause has been dismissed or otherwise finally disposed of, to alter its judgment, except in matters of form, or to correct a clerical error or misprision of the clerk, or the like. *Schell v. Dodge*, 107 *U. S.* 629-630, 27 L. ed. 601, Oct. T., 1882.

It is inconsistent with the constitution of appellate courts to modify a general reversal of a judgment or decree; it is absolute and attended with all legal consequences which no court can avert by any *salvo*, or declaration that it is reversed only *pro forma*. Dissenting opinion of Mr. Justice Baldwin in *Harrison v. Nixon*, 9 *Pet.* 507, 9 L. ed. 210, Jan. T., 1835.

When the Supreme Court has executed its power in a cause before it and its final decree or judgment requires some further act to be done, it cannot issue an execution, but shall send a mandate to the court below to award it. *Sibbald v. United States*, 12 *Pet.* 488-492, 9 L. ed. 1169, Jan. T., 1838.

No attorney or solicitor can withdraw his name, after he has once entered it on the record, without leave of the court. No court will permit an attorney who has conducted a cause, to withdraw his name after the case is finally decided, thus making it impossible to serve a citation where the party to the cause is a non-resident or unknown. *United States v. Curry*, 6 *How.* 106-111, 12 L. ed. 365, Jan. T., 1848.

The Supreme Court will grant leave to withdraw an appearance whenever asked, saving all rights of the adverse party. *McGuire v. Massachusetts*, 3 *Wall.* 382-387, 18 L. ed. 165, Dec. T., 1865.

Under the Judiciary Act of 1789, ch. 20, giving appellate jurisdiction to the Supreme Court from the final judgment or decree of the highest court of a State, the act does not prescribe the tribunal to which the writ of error shall be directed. It may be directed to that court in which the record and judgment to be examined are deposited, or to that whose judgment is to be examined, where such court has returned the record to the trial court. The judgment to be examined must be that of the highest court of the State, but the record of that judgment may be brought from any court in which it may be deposited and found. *Gilson v. Hoyt*, 3 *Wheat.* 246-304, 4 L. ed. 381. See *Bacon v. State of Texas*, 163 *U. S.* 207, 41 L. ed. 133, cited under Rule 8.

It is the duty of the party who desires to bring a case before the Supreme Court to see that proper and legal process is sued out for that purpose; if he fails to do so he has no right to treat an oversight or error of the clerk of the court below, as a mere clerical error, for which the party is not to be held responsible. *Hodge v. Williams*, 22 *How.* 87-89, 16 L. ed. 237, Dec. T., 1859.

A decree dismissing a cross-bill in equity cannot be considered, standing alone as a final decree in the suit, and is not the subject of an independent appeal; it can only be reviewed upon an appeal from a final decree disposing of the whole case. *Ayres v. Carter*, 17 *How.* 591; *Ex parte Railway Co.*, 95 *U. S.* 221, 15 L. ed. 355.

When complainant has a decree in his favor, but not to the extent prayed for in his bill, and the respondent appeals, if the complainant desires a more favorable decree he must enter a cross-appeal that he may be heard on the appeal. *Corning v. Troy I. & N. Factory*, 15 *How.* 451-466, 14 L. ed. 475, Dec. T., 1853.

The appellant is the moving party, the motion is to reverse the decree of the lower court: if that fails because the Supreme Court is equally divided the decree stands, and must be affirmed. The judgment of affirmance is the judgment of the entire court, though it does not become

an authority. The English practice stated. *Durant v. The Essex Company*, 7 *Wall.* 107-113, 19 L. ed. 157.

The judgment is as conclusive and binding upon the parties as if rendered upon the concurrence of all the judges. *Ib.*

A judgment or decree may be affirmed upon an equal division of the members sitting though not a full bench. That the decree is affirmed by a divided court is not a reason for ordering a re-argument before a full bench. *Brown v. Aspden's Adm.*, 14 *How.* 25-28, 14 L. ed. 312.

It is the duty of the court to respect its former decisions otherwise the supreme law of the land would change with changing judges. Mr. Justice Baldwin in *Ex parte Crane*, 5 *Pet.* 202, 8 L. ed. 97.

There are no cases where an adherence to the maxim "*stare decisis*" is so absolutely necessary to the peace of society, as those which affect retroactively the jurisdiction of courts. *Marshall v. Balt. & Ohio R. Co.*, 16 *How.* 314-325, 14 L. ed. 958.

Absence of one or all the counsel of one party furnishes no ground to delay a case without the consent of the adverse party. *Chaffee v. Hayward*, 20 *How.* 208-210, 15 L. ed. 805.

Appeals in equity are heard upon the pleadings and proof below. No new evidence can be admitted, and the pleadings cannot be amended in the Supreme Court. *Pacific Railroad Company v. Missouri Pacific R. Co.*, 95 *U. S.* 1, 24 L. ed. 348.

The Supreme Court may make such decree in the cause as the court below ought to have rendered. *Wickliff v. Owens*, 17 *How.* 47, 15 L. ed. 46.

The discretion of inferior courts in allowing or refusing amendments of pleadings will not be controlled by the Supreme Court, but a cause improperly dismissed will be ordered re-instated by mandamus. *Ex parte Bradstreet*, 7 *Pet.* 634-648, 8 L. ed. 648.

Mandamus will issue to compel an inferior court to try a cause by it improperly dismissed. *Ib.*

Where the complainant is entitled to a broader decree than is rendered in the court below if he fails to enter a cross appeal, if the defendant's appeal is not sustained, the decree rendered by the court below cannot be reversed for errors with respect to the rights of the complainant. *Southern Pac. Ry. Co. v. United States*, 168 *U. S.* 1-66, 42 L. ed. 383.

There is no rule of court or principle of law which prevents the appellant from assuming in the Supreme Court a ground of relief not suggested in the court below, if in harmony with the pleadings, though

such course may be productive of inconvenience. *Watts v. Waddle*, 6 *Pet.* 389-402, 8 L. ed. 443.

Where it is apparent upon the record that the trial court was without jurisdiction the Supreme Court may not consider objections made to its jurisdiction to review, but must dismiss for the lack of the trial court's jurisdiction. *Mattingly v. The Northwestern, etc., Co.*, 158 *U. S.* 53-57, 39 L. ed. 895.

Although the averment of citizenship in the complaint is insufficient, the whole record may be looked to in the appellate court for the purpose of curing a defective averment of diverse citizenship, and if the requisite citizenship is anywhere expressly averred in the record, or facts are therein stated which in legal intendment constitute such allegation, that is sufficient. *Sun Printing & Pub. Assn. v. Edwards*, 194 *U. S.* 377-382, 48 L. ed. 1030, Oct. T., 1903.

Although by sec. 6 of the Act of Mar. 3, 1891 (sec. 241, Judicial Code), the right of appeal from the Circuit Court of Appeals in cases not therein made final was limited to causes in which the amount in controversy exceeds \$1,000, *Held*, the bill need not state that a certain amount is in controversy, but the fact may appear by affidavit after the appeal is taken to the Supreme Court. *United States v. Trans-Missouri, etc., Assn.*, 166 *U. S.* 290-310, 41 L. ed. 1017, Oct. T., 1896.

The amount in controversy may be made to appear after the appeal is taken in any manner other than by the record that establishes it to the satisfaction of the Supreme Court. *Ib.*

It may appear by a stipulation between the parties, though not controlling. *Ib.* 310.

Where the record fails to show the amount in controversy the defect may be supplied by affidavits. *Parker v. Morrill*, 106 *U. S.* 1, 27 L. ed. 73.

Generally speaking, the joinder in one suit of several plaintiffs or defendants who might have sued or been sued in separate actions does not enlarge the appellate jurisdiction. When property is claimed by several persons suing together the test is whether they claim under one common right, the adverse party having no interest in its distribution, or claim it under separate and distinct rights, each of which is contested by the adverse party. *Gibson v. Shufeldt*, 122 *U. S.* 27-30, 30 L. ed. 1085, Oct. T., 1886.

When two persons are sued, or two parcels of property are sought to be recovered or charged by one person in one suit, the test is whether the defendants' alleged liability to the plaintiff, or claim to the property, is joint, or several. *Ib.* 30.

Where the object of the suit is to apply property worth more, to the

payment of a debt for less than the jurisdictional amount, it is the amount of the debt and not the value of the property that determines the jurisdiction. *Ib.* 29.

When several persons join in one suit to assert several and distinct interests and those interests alone are in dispute the amount of the interests of each is the limit of appellate jurisdiction. *Ib.*

Where an appeal had been allowed after a contest as to the value of the matter in dispute and there was in the record evidence to sustain the jurisdiction of the Supreme Court, held the appeal would not be dismissed because the estimates adopted by the court below might have been too high, unless there was such a decided preponderance of evidence against jurisdiction as to make it the duty of the court to dismiss the appeal. *Gage v. Pumpelly*, 108 *U. S.* 164, 27 L. ed. 668.

The Supreme Court accepts the findings of the trial court upon questions of fact. *Ocean S. Nav. Co. v. Aitken*, 196 *U. S.* 589, 49 L. ed. 610.

Except in very clear cases. *United States v. Clark*, 200 *U. S.* 601-608, 50 L. ed. 616.

That the appeal bond runs not only to the party against whom the decree was rendered but also to other parties defendant as to whom the suit was dismissed does not affect its validity, or the integrity of the appeal. *Hill v. Chicago, etc., R. Co.*, 129 *U. S.* 170-175, 32 L. ed. 653.

Though the record contains no evidence of the jurisdiction of the trial court arising out of the citizenship of the parties, the Supreme Court has jurisdiction and will review a decree rendered in an equity suit which is ancillary to a suit between the same parties on the law side of the court below, since the trial court's jurisdiction is apparent. *Johnson v. Christian*, 125 *U. S.* 642, 31 L. ed. 820.

From a final decree against it complainant took an appeal to the Circuit Court of Appeals, and thereafter a second appeal to the Supreme Court, both appeals being taken within six months from the entry of the decree.

The appeal in the Circuit Court of Appeals went to a decree and not being final under sec. 6 of the Act of 1891 an appeal was allowed to the Supreme Court. That court finding that the jurisdiction of the trial court rested solely on the ground that the cause of action arose under the Constitution of the United States and therefore that the appeal lay direct to that court reversed the decree of the Circuit Court of Appeals for want of jurisdiction in that court, and proceeded to determine the cause on the direct appeal. *Held*, it was not the intention of the Circuit Court of Appeals Act that a party should have two appeals on the merits. *Union & Planters Bank v. Memphis*, 189 *U. S.* 74, 47 L. ed. 712.

Appeals under sec. 25b of the Bankruptcy Act of May 27, 1905, are required by paragraph 2 of General Orders in Bankruptcy 36 to be taken within 30 days after the judgment or decree. The limitation of time for appeal has the same effect as if contained in the statute. The allowance of an appeal on certificate by a Justice of the Supreme Court cannot operate as an adjudication that it is taken in time. *Comboy v. First Natl. Bank*, 203 *U. S.* 141-144, 51 L. ed. 128.

A petition for rehearing filed after the time for appeal has expired cannot reinvest a right of appeal. *Ib.*

Where an opinion of a State court is by law required to be filed and spread on the records and it is made part of the transcript, it is examinable by the Supreme Court to determine whether a Federal question is involved in the decision. *Gross v. United States Mortgage Co.*, 108 *U. S.* 477-486, 27 L. ed. 798, Oct. T., 1882.

If the State court proceeds to judgment in a cause, notwithstanding an application for removal, its ruling in retaining the case will be reviewable in the Supreme Court after final judgment under sec. 709, *Rev Stats.* *Stone v. South Carolina*, 117 *U. S.* 430-432, 29 L. ed. 963, Oct. T., 1885.

If the Circuit Court and the State court go to judgment respectively, each judgment is open to revision in the appropriate mode. *Meyer v. Delaware R. Const. Co. (Removal Cases)*, 100 *U. S.* 457-475, 25 L. ed. 600, Oct. T., 1879.

A general statement in the record that the decision of a State court is against the constitutional rights of a party, or against the Fourteenth Amendment, or that it is without due process of law, particularly when these objections appear only in specifications of error, will not raise a Federal question within sec. 709, *Rev. Stats. (U. S. Comp. Stats. 1901, p. 575)*. *Clarke v. McDade*, 165 *U. S.* 168-172, 41 L. ed. 674, Oct. T., 1896.

The bare averment of a Federal question is not sufficient. There must at least be color of ground for such averment. *New Orleans v. New Orleans W. Co.*, 142 *U. S.* 79-87, 35 L. ed. 946, Oct. T., 1891.

To give the Supreme Court jurisdiction under sec. 709, *Rev. Stats. (U. S. Comp. Stats. 1901, p. 575)*, to review the judgment of a State court because of its denial of a right, etc., under the United States Constitution, or law or treaty, it must appear on the record that such right, title, privilege, or immunity was specifically set up or claimed at the proper time and in the proper way. *Leeper v. State of Texas*, 139 *U. S.* 462-467, 35 L. ed. 227, Oct. T., 1890.

Where no opinion was delivered by the highest court of a State, but a certificate of the chief justice states that the validity of a State law was drawn in question in that court upon the ground of its impairment of a contract relied on by the plaintiff in error, and that the decision of the highest court of the State was in favor of the validity of such legislation, such certificate may be resorted to to show that a Federal question otherwise appearing in the record to have been raised, was actually passed upon. *Gulf, etc., R. Co. v. Hewes*, 183 *U. S.* 66-68, 46 L. ed. 88, Oct. T., 1901.

Such certificate is insufficient to give jurisdiction where the record fails to show that a Federal question was properly raised. *Ib.* 69.

The opinion of the trial court which is required by sec. 2 of Rule 8 to be annexed to and transmitted with the record cannot be referred to for the purpose of ascertaining the evidence or the facts found below on which the judgment is based, but the Supreme Court may look into such opinion to ascertain whether either party in the court below claimed in proper form that a state law upon which some of the issues depended was in contravention to the Constitution of the United States. *Loeb v. Trustees, etc.*, 179 *U. S.* 472-483, 45 L. ed. 287.

While a right under a Federal statute may not have been set up in the complaint in a State court as where it is not an original right, but a right available in rebuttal of a defense made, where it appears by the record to have been insisted upon in argument, and it appears in the opinion required by the rules to be sent up with the record that it was considered by the court and ruled against the party relying upon it, such party may have a writ of error to the highest State court to review its judgment. *San Jose L. & W. Co. v. San Jose Ranch Co.*, 189 *U. S.* 177-180, 47 L. ed. 768. Noting the earlier cases in which a different rule was announced.

It is too late to raise a Federal question for the first time in a petition for a rehearing in a State court of last resort after its final judgment. If however the State court actually entertains the petition and decides the Federal question and this appears by the record the requirement of sec. 709, *Rev. Stats., U. S. Comp. Stats.* 1901, p. 575, is complied with. *McCorquodale v. Texas*, 211 *U. S.* 432, 53 L. ed. 270.

Where a Federal question is for the first time raised in a petition for a rehearing in the highest court of a State, if that court refuses the rehearing and dismisses the petition without passing upon the Federal question the judgment is not reviewable in the Supreme Court; but if the State court entertains the petition and decides the Federal question raised against the contention of the plaintiff in error, the decision is reviewable though first presented in the motion for rehearing. *Mallett v. North Carolina*, 181 *U. S.* 589-592, 45 L. ed. 1018, Oct. T., 1900.

A certificate of the Chief Justice of a State court of last resort, never made the order of the court, nor a part of the record, that the court in denying a rehearing did decide the Federal question raised in the petition for rehearing cannot confer jurisdiction on the Supreme Court to review the final judgment. *Consolidated Turnpike Co. v. Norfolk, etc., Co.*, 228 *U. S.* 326.

A recital of the presiding judge of a state court of last resort that the court orders it to be certified and made a part of the record in the case that a Federal question raised for the first time in a petition for rehearing was considered and decided adversely, though nothing else is contained in the record indicating that a Federal question was raised and decided, will be treated as incorporating into the record such proof of the existence of a Federal question as is required by sec. 709, *Rev. Stats., U. S. Comp. Stats.* 1901, p. 575. *Ib.*

An order of the Circuit Court remanding a cause to the State court cannot be reviewed by any direct proceeding for that purpose. *Missouri Pacific R. Co. v. Fitzgerald*, 160 *U. S.* 567-582, 40 L. ed 542, Oct. T., 1895.

The power of the Supreme Court to afford a remedy by mandamus when a cause removed from a State court is improperly remanded was taken away by the Act of Mar. 3, 1887. *Ex parte Pennsylvania Co.*, 137 *U. S.* 451-454, 34 L. ed. 740, Oct. T., 1890.

If a case be removed to the Circuit Court and a motion to remand be denied, then after final judgment the action of the Circuit Court in refusing to remand may be reviewed in the Supreme Court on error or appeal. *Graves v. Corbin*, 132 *U. S.* 571-590, 33 L. ed. 469, Oct. T., 1889.

The settled decisions of the highest State courts upon the construction of their own constitution and laws are conclusive in the Supreme Court in cases involving any question re-examinable under sec. 25 of the Judiciary Act (sec. 237, Judicial Code). *Providence Savings Institution v. Massachusetts*, 6 *Wall.* 611, 18 L. ed. 912.

If the highest judicial tribunal of a State adopts new views as to the proper construction of a statute of such State and reverses its former decisions, the Supreme Court will follow the latest settled adjudication. *Leffingwell v. Warren*, 2 *Black*, 67 *U. S.* 599, 17 L. ed. 262.

The construction given to a statute of a State by the highest judicial tribunal of such State is regarded by the courts of the United States as a part of the statute, and as binding as the text. Such construction is a rule of decision under the 34th section of the Judiciary Act of 1789, ch. 20, 1 *Stat. L.* 73. *Ib.*

Where the law governing the case is the common law, the decisions of the highest State courts do not control, except in a class of cases where by repeated decisions a rule of property as to land titles peculiar to a State have been established. *Yates v. Milwaukee*, 10 *Wall.* 497, 19 L. ed. 987.

Under the Act of Mar. 3, 1891, establishing the Circuit Court of Appeals, cases in which the jurisdiction of the District or Circuit Courts were in issue could be brought to the Supreme Court only after final judgment. *McLish v. Roff*, 141 *U. S.* 661, 35 L. ed. 893; *Railway Co. v. Roberts*, 141 *U. S.* 690, 35 L. ed. 905.

Certiorari will not be granted to review an order of the Circuit (District) Court which is reviewable by appeal. The Supreme Court is authorized by sec. 716, *Rev. Stats., U. S. Comp. Stats.* 1901, p. 580, to issue the writ in all proper cases. The rule is that as between private persons the writ of certiorari to bring up a decree or order for review on special cause shown, will be granted or denied in the sound discretion of the court; it will be refused when there is a plain and adequate remedy by appeal or otherwise. *In re Tampa Suburban R. R. Co.*, 168 *U. S.* 583-588, 42 L. ed. 590, Oct. T., 1897.

Held, certiorari to the Circuit Court of Appeals to review a judgment or decree of that court, made final by way of exclusion of any review by writ of error or appeal by sec. 6 of the Act of Mar. 3, 1891 (26 *Stat. L.* 826), might be issued by the Supreme Court in any case whether its advice is requested or not, but will be issued only where questions of gravity and importance are involved, or in the interest of uniformity of decision. *Lau Ow Bew v. United States*, 144 *U. S.* 47-58, 36 L. ed. 344, Oct. T., 1891.

Held, The writ of certiorari might be issued to the Circuit Court of Appeals under the Act of Mar. 3, 1891, pending action by that court, although this is a power not ordinarily to be exercised. *United States v. The Three Friends*, 166 *U. S.* 1-49, 41 L. ed. 913, Oct. T., 1896.

The Supreme Court may issue the writ of certiorari to review the action of the Circuit Court of Appeals denying an original application for mandamus to compel the judge of a district court to proceed in an action before it. *Held*, such writ might issue in exercise of the power conferred by sec. 716, *Rev. Stats.* (sec. 262, *Judicial Code, U. S. Comp. Stats.* 1901, p. 580). *McClellan v. Carland*, 217 *U. S.* 268-279, 54 L. ed. 766.

NOTE.—See sec. 234, *Judicial Code*.

Certiorari under sec. 240, *Judicial Code*, may not issue except where the decree or judgment of the Circuit Court of Appeals is final. *Ib.*, p. 279.

Where there is no amount in controversy there can be no appeal to the Supreme Court from the Circuit Court of Appeals. *Ib.* 279.

The power of the Supreme Court to require a case to be certified to it by the Circuit Court of Appeals under the Act of 1891 (sec. 240, Judicial Code) is not affected by the condition of the case as it exists in the Court of Appeals. It extends to every case pending in the Circuit Court of Appeals and may be exercised before or after any decision by that court, provided the case is one in which the determination of the Circuit Court of Appeals would be final. *Forsyth v. Hammond*, 166 *U. S.* 506-514, 41 L. ed. 1098.

NOTE.—By sec. 240, Judicial Code, the writ is issued only on petition of a party to the cause.

The Supreme Court had jurisdiction by sec. 14 of the Judiciary Act of 1789, sec. 716, *Rev. Stats., U. S. Comp. Stats.* 1901, p. 580, to issue the writ of certiorari to review judgments in contempt proceedings in the Circuit Courts, they not being reviewable on appeal or writ of error. *Ex parte Chetwood*, 165 *U. S.* 443-462, 41 L. ed. 788, Oct. T., 1896.

Although prior to the Act of Mar. 3, 1891, the writ of certiorari had seldom been issued by the Supreme Court except as auxiliary process, it will be allowed whenever it is required to correct excess of jurisdiction and in furtherance of justice, under authority conferred by sec. 14 of the Judiciary Act (sec. 716, *Rev. Stats., U. S. Comp. Stats.* 1901, p. 580). *Ib.*

THE PRESENT RULES
OF THE
SUPREME COURT OF THE UNITED STATES

RULE I—Clerk

1. The clerk of this court shall reside and keep the office at the seat of the National Government, Clerk's office; clerk not to practice. and he shall not practice, either as attorney or counsellor, in this court, or in any other court, while he shall continue to be clerk of this court.

2. The clerk shall not permit any original record or paper to be taken from the court room, or from the office, without an order from the court, except as provided by Rule 10.

Promulgated December 22, 1911. 222 U. S.

Decisions

The occasion for the amendment made in the second clause of the rule stated in an announcement made Nov. 13, 1882. Matter of amendments to Rules 1 and 10, 108 U. S. 1-4, 27 L. ed. 629, Oct. T., 1882.

Where the judge has power to appoint a clerk *pro tempore*, such appointee is clerk *de facto*, and his acts will be valid so far as regards a third party, though there is irregularity in the appointment. *Cocke v. Halsey*, 16 Pet. 71-87, 10 L. ed. 896, Jan. T., 1842.

Where the law gives the court the power of appointing its own clerk, there being no provision of law for his removal, the office is to be held at the will and discretion of the court, and the mere appointment of a successor is *per se* a removal of a prior incumbent. *Ex parte Hennen*, 13 Pet. 230-261, 10 L. ed. 154, Jan. T., 1839.

RULE II—Attorneys and Counsellors

1. It shall be requisite to the admission of attorneys or

counsellors to practice in this court, that they shall have been such for three years past in the highest courts of the States to which they respectively belong, and that their private and professional characters shall appear to be fair.

2. They shall respectively take and subscribe the following oath or affirmation, viz:

I, _____, do solemnly swear (or affirm) that I will demean myself, as an attorney and counsellor of this court, uprightly, and according to law; and that I will support the Constitution of the United States.

Clause 1 adopted Feb. 5, 1790, 2 *Dallas*, 399; published as general Rule 2 in 1 *Cranch*, xvi; 1 *Wheat.* xiii; 1 *Pet.* vi; 1 *How.* xxiii; 21 *How.* v, and 108 *U. S.* 573.

Clause 2 adopted Feb. 5, 1790, as general Rule 4, 2 *Dallas*, 399; published 1 *Cranch*, xvi; 1 *Wheat.* xiii; 1 *Pet.* vi; 1 *How.* xxiii; 21 *How.* v; amended Mar. 10, 1865, to conform to the Act of Congress of Jan. 24, 1865 (13 *Stat. L.* 424), 2 *Wall.* vii. Amendment annulled December Term, 1866, 4 *Wall.* vii. See *Ex parte* Garland, 4 *Wall.* 333, 18 *L. ed.* 370; republished 108 *U. S.* 573.

The provisions contained in original Rule 3, that counsellors should not practice as attorneys, nor attorneys as counsellors, was omitted in the general revision of the rules at the December Term, 1858.

Promulgated Dec. 22, 1911. 222 *U. S.*

Decisions

Where an attorney is otherwise qualified under the rules the fact that he has been stricken from the rolls of another court for contempt will not be cause for the Supreme Court to refuse his admission as counsellor of that court. *Ex parte* Tillinghast, 4 *Pet.* 108-110, 4 *L. ed.* 799, Jan. T., 1830.

Attorneys and counsellors are officers of the court, admitted upon evidence of their possessing sufficient learning and fair private character.

In the Supreme Court the fact of the admission of such officers to the highest courts of the States to which they belong for three years preceding their application, is regarded as sufficient evidence of their requisite legal learning, and the statement of counsel moving their admission, sufficient evidence that their private and professional character is fair. *Ex parte* Garland, 4 *Wall.* 333-378, 18 *L. ed.* 370, Dec. T., 1866.

From the entry of the order for admission attorneys are responsible to the court for professional misconduct, and can only be deprived of their office for misconduct, declared by the judgment of the court after opportunity to be heard.

This admission or exclusion is the exercise of judicial power. *Ib.* 379.

The character and duties of counsel do not devolve on the personal representative of deceased counsel, so as to allow of the service of a citation upon such counsel's executors. *Bacon v. Hart*, 66 U. S. 38, 17 L. ed. 52, Dec. T., 1861.

The courts can know no counsel in the cause except those who regularly appear as such on the record, and will not notice law partnerships or other private relations between members of the bar. *Ib.* 38.

The authority of an attorney to sue may be questioned upon affidavits, or other proof. *Standefer v. Dowlin*, *Hempst.* 209; *Fed. Cases*, 132,849.

The court has power to inquire as to the authority an attorney has to sue or defend, and before issue joined the defendant may require an attorney who brings the action to file his warrant. *King of Spain v. Oliver*, 2 *Wash. C. C.* 429; *Fed. Cases*, 7,814.

When an attorney of a court of record appears in an action, his authority, in the absence of any proof to the contrary, will be presumed. A record which shows such an appearance will bind the party until it is proven that the attorney acted without authority. *Hill v. Mendenhall*, 21 *Wall.* 453-454, 22 L. ed. 616, Oct. T., 1874.

Where a client sought to dismiss his attorney regularly retained on a contingent fee, and to require payment into court of the moneys collected in the suit, *Held*, that a client has the right to dismiss his attorney even when employed under a contract for a stipulated part of the recovery; but where the attorney has not been guilty of any misconduct calling for the exercise of summary jurisdiction, the court will leave the parties to their remedy at law as to collections had in the suit. *Texas v. White (In re Paschal)*, 10 *Wall.* 483-497, 19 L. ed. 996-997, Dec. T., 1870.

Quære, whether in discharging his attorney employed under a stipulation for a definite part of the recovery, the client does not make himself liable for the whole of the contingent fee agreed upon? *Ib.* 497.

The court will not permit counsel who represent parties interested in the cause, or the questions involved, but who are not parties to the record, to appear in a cause. *Harrison v. Nixon*, 9 *Pet.* 483-494, 9 L. ed. 205, Jan. T., 1835.

The court censured counsel for attempting to influence its decision by reference to matters not in the record, contained in his printed argument in violation of a stipulation of counsel. *Schley v. Pullman P. Car. Co.*, 120 U. S. 575-577, 30 L. ed. 790, Oct. T., 1886.

In a District Court the relations between the court and the attorneys practicing in it, and their respective rights and duties, are regulated

by the rules and practice of the common law, and it rests exclusively with such courts to determine who are qualified to become attorneys and for what cause they should be removed. *Ex parte Secombe*, 19 How. 9-13, 15 L. ed. 565, Dec. T., 1856.

The moment the courts of the United States were called into existence they became possessed of the power inherent in all courts to punish for contempt. The Act of Congress of Mar. 2, 1831, specifying the cases in which summary punishment for contempt may be inflicted, in terms applies to all United States courts. Whether it limits the authority of the Supreme Court which derives its existence from the Constitution, not decided. *Ex parte Robinson*, 19 Wall. 505-510, 22 L. ed. 208, Oct. T., 1873.

The power of removal possessed by all courts which have the authority to admit attorneys to practice, should only be exercised when the continuance of the attorney in practice is incompatible with a proper respect of the court for itself, or a proper regard for the integrity of the profession, and only upon notice to the offending party and an opportunity for explanation and defense. *Bradley v. Fisher*, 13 Wall. 335-356, 20 L. ed. 652, Dec. T., 1871.

The constitutional privilege of trial by jury does not apply to prevent courts from punishing its officers for contempt or from removing them in proper cases. *Ex parte Wall*, 107 U. S. 265-288, 27 L. ed. 561, Oct. T., 1882.

The charges in a regular complaint against an attorney should be made on oath; the information against him may be waived where the attorney himself invites the inquiry; but the testimony received should be on oath. *Ex parte Burr*, 9 Wheat. 529-531, 6 L. ed. 152, Feb. T., 1824.

No formal allegations are required. All that is requisite, when for matters not occurring in open court, is that notice should be given to the attorney of the charges against him, and an opportunity afforded him for explanation and defense. *Randall v. Brigham*, 7 Wall. 523-539, 19 L. ed. 293, Dec. T., 1868.

Proceedings for disbarment are not a criminal procedure necessitating formal legal process. *Ib.*

Where an attorney is charged by affidavit with fraud or malpractice in his profession, the court in every instance, on motion, will order him to appear and answer, and will deal with him as the facts may appear. *Ex parte Bradley*, 7 Wall. 364-367, 19 L. ed. 218, Dec. T., 1868.

The power of the court to punish attorneys as its officers, for misbehavior in the practice of their profession, is a distinct head of proceeding, from that of contempt of court, committed in the immediate view and presence of the court. *Ib.* 374.

In the Federal courts the power to disbar is distinct and separate from the power conferred by sec. 725, *Rev. Stats. (U. S. Comp. Stats. 1901, p. 583)*, to punish for contempt, and, in so far as exercised for unprofessional conduct not coming within the limitations imposed by that statute, is unabridged. *In re Boone*, 83 *Fed. R.* 944-948.

It is not necessary the acts or conduct be such as would subject the attorney to indictment or civil liability. Any conduct showing unfitness for the confidence and trust which attend the relation of attorney and client, or which renders the attorney unworthy of public confidence, constitutes a ground for disbarment. *Ib.* 948.

The obligation of fidelity to a client's interests continues after the termination of the relation of attorney and client, and is not confined to cases in which one is employed as attorney. *Ib.* 952.

RULE III—Practice

This court considers the former practice of the courts of king's bench and of chancery, in Eng- Practice of Supreme Court. land, as affording outlines for the practice of this court; and will, from time to time, make such alterations therein as circumstances may render necessary.

Adopted Aug. 8, 1791, as original Rule 7, 2 *Dallas*, 411; published in 1 *Cranch*, xvii; 1 *Wheat.* xiv; 1 *Pet.* vi; 1 *How.* xxiv; revised and made Rule 3, December Term, 1858, 21 *How.* v; amended Jan. 7, 1884; republished 108 *U. S.* 574.

Promulgated December 22, 1911. 222 *U. S.*

Decisions

The rule announced in answer to the attorney-general's request for information. 2 *Dallas*, 4-11, 1 L. ed. 437.

The English chancery is a court of original jurisdiction. Its rules have not been adopted by the Supreme Court an appellate tribunal. *Brown v. Aspden's Adms.*, 14 *How.* 25-26, 14 L. ed. 311, Dec. T., 1852.

Congress may prescribe the mode of proceeding in causes within the original jurisdiction of the Supreme Court, but in the absence of such legislation the court itself has power to adopt its form of proceedings. *Florida v. Georgia*, 17 *How.* 478-491, 15 L. ed. 189, Dec. T., 1854.

In cases of original jurisdiction the Supreme Court will frame its proceedings according to those which had (prior to 1791) been adopted in the English courts in analogous cases, although not bound to follow the practice where it would embarrass the case by technicalities, or defeat justice. *California v. So. Pac. Co.*, 157 *U. S.* 229-249, 39 L. ed. 690, Oct. T., 1894.

The forms of proceeding in the English courts of error have never been adopted or followed by the Supreme Court. *Brooks v. Norria*, 11 *How.* 204-208, 13 L. ed. 666.

It is not essential that a court in establishing or changing its practice should do so by the adoption of written rules. It may be done by a uniform mode of procedure for a series of years, and this forms the law of the court. *Duncan's Heirs v. United States*, 7 *Pet.* 435-451, 8 L. ed. 745, Jan. T., 1833.

This court has no power to dispense with, change or modify any provisions of an Act of Congress, prescribing the time and manner in which appeals may be taken. *United States v. Curry*, 6 *How.* 106-111, 12 L. ed. 365.

In chancery cases, or in any other class of cases where all the evidence becomes part of the record in the highest court of a State, the Supreme Court upon such record brought there, can review the decision of the State court on both law and fact as may be necessary to determine the validity of the Federal right. But in cases where the facts are submitted to a jury the Supreme Court has the same inability to review those facts in a case coming from a State court as in a case coming from a Federal court. *Bridge Co. v. Kan. Pacific Ry. Co.*, 92 *U. S.* 315-317, 23 L. ed. 576.

RULE IV—*Bill of Exceptions*

The judges of the district courts in allowing bills of exception shall give effect to the following rules:

1. No bill of exceptions shall be allowed which shall contain the charge of the court at large to the jury in trials at common law, upon any general exception to the whole of such charge. But the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts; and those matters of law, and those only, shall be inserted in the bill of exceptions and allowed by the court.

2. Only so much of the evidence shall be embraced in a bill of exceptions as may be necessary to present clearly the questions of law involved in the rulings to which exceptions are reserved, and such evidence as is embraced therein shall be set forth in condensed and narrative form, save as a

proper understanding of the questions presented may require that parts of it be set forth otherwise.

Adopted at January Term, 1852, as general Rule 38; published 6 *Pet.* iv; 1 *How.* xxxiv; made Rule 4 in the revision at the December Term, 1858; published in 21 *How.* vi and 108 *U. S.* 574.

Promulgated December 22, 1911. 222 *U. S.*

Statutory Provisions

A bill of exceptions allowed in any cause shall be deemed sufficiently authenticated if signed by the judge of the court in which the cause was tried, or by the presiding judge thereof, if more than one judge sat on the trial of the cause, without any seal of court or judge being annexed thereto. Sec. 953, *Rev. Stats., U. S. Comp. Stats.* 1901, p. 696.

Decisions

A bill of exceptions is altogether unknown in chancery practice. *Ex parte Story*, 12 *Pet.* 339-343, 9 L. ed. 1110, Jan. T., 1838.

A bill of exceptions is used not to draw the whole matter into examination again, but only separate and distinct matters of law, or a point of law arising out of a fact not denied. The only modes known to the common law to re-examine the facts are the granting of a new trial by the court where the issue is tried, or the award of a new trial by an appellate court, for some error of law in the proceedings. *The Abbotsford v. Johnson*, 98 *U. S.* 440-444, 25 L. ed. 170, Oct. T., 1878.

A bill of exceptions is a comprehensive method of enlarging the record by incorporating into it not only the facts of the case, but the rulings of the court in admitting and rejecting evidence, and the instructions given to the jury. After it is signed (sealed) and filed in the case it becomes a part of the record, and the matters therein set forth can no more be disputed than those contained in any other part of the same record, and are alike subject to revision in a court of error. The rulings of the trial court in admitting or rejecting evidence can only be reviewed on bill of exceptions. *Suydam v. Williamson*, 20 *How.* 427-433, 15 L. ed. 980, Dec. T., 1857.

NOTE. The bill is no longer required to be sealed. Sec. 953, *Rev. Stats., U. S. Comp. Stats.* 1901, p. 696. See *Staunton v. Embry*, *post*, p. 72.

Where the facts are disputed, and cannot be arranged by counsel for a special verdict except from evidence admitted under rulings of the court as to its admissibility, a bill of exceptions is often the only method of preserving the rights of a party for review; but where there is no dispute as to the facts the same purpose may be safely accomplished by a special verdict, or by an agreed statement of facts, drawn up, entered of record

and submitted directly to the court for decision, or a general verdict may be taken subject to the opinion of the court on the facts agreed, and in both cases the questions of law arising from the facts thus spread upon the record may be re-examined on a writ of error. *Ib.* 434-435. Opinion by Mr. Justice Clifford, going extensively into the practice.

Not even the substance of the evidence given on the trial upon questions about which there is no controversy, if admitted without objection, and no point made at the trial as to the matter it was intended to prove, should be included in a bill of exceptions. A bill of exceptions should contain only so much of the evidence as may be necessary to explain the bearing of the rulings of the court upon matters of law, in reference to the questions in dispute between the parties to the case, and which may relate to exceptions noted at the trial. *Grand Trunk R. Co. v. Ives*, 144 *U. S.* 408, 36 *L. ed.* 488.

The Supreme Court will not presume that the entire evidence is set forth in the bill of exceptions as that would presume a violation of the settled rules of practice as to what such bill contains. *Ib.*

At common law a writ of error lay for error of law apparent on the record, but not for an error of law not apparent on the record. If a party alleged any matter of law at the trial and was overruled by the judge he was without redress, the error not appearing in the record. To remedy this evil the statute 13 Ed. I., ch. 31 was passed which gave the bill of exceptions. *Ex parte Crane*, 5 *Pet.* 190-199, 8 *L. ed.* 96.

Bills of exception may embrace all judgments or opinions of the court that arise in the course of a cause which are the subject of revision by the appellate court, and which do not otherwise appear on the record. To present the question to an appellate court the subordinate tribunal must ascertain the facts upon which the judgment or opinion is founded. *Railroad Co. v. Myers*, 18 *How.* 246-251, 15 *L. ed.* 382, Dec. T., 1855.

There is no objection to the adoption by the courts of the United States of the practice to examine arbitrators to whom a reference has been made, to ascertain facts material to the validity of the award. *Ib.* 252.

Upon a reference, where the bill of exceptions set out the objections to the award, also the testimony of the referee on an examination had, which showed the facts upon which the objections were founded, the exceptions were held to be sufficient. *Held*, further, that the conclusions of the referee were final and the Supreme Court could not revise his mistakes either of law or of fact. *Ib.* 253.

Only rulings and decisions in matter of law after the return of the award are reviewable, even where the case has been referred by a rule of court to an arbitrator. *Ib.* 253.

A bill of exceptions should state what evidence was offered of the facts upon which the opinion of the court was requested. *Vasse v. Smith*, 6 *Cranch*, 226-233, 3 L. ed. 209, Feb. T., 1810.

Where in a bill of exceptions the court bases its action on its rules adopted to regulate the time and manner of filing pleas, the party assigning error should insert in his bill of exceptions so much of the rule or rules as affects the question. *Packet Co. v. Sickles*, 19 *Wall*. 611-616, 22 L. ed. 203-204, Oct. T., 1873.

A bill of exceptions is conclusive upon the court, which will not presume that any material part of the evidence is omitted. *Bingham v. Cabot*, 3 *Dallas*, 19-38, 1 L. ed. 500, Feb. T., 1795.

The appellate court has no power to correct any errors or omissions that may be made in the court below in framing exceptions. *Stimpson v. Westchester R. Co.*, 3 *How*. 553-556, 11 L. ed. 724, Jan. T., 1845.

Where it appears on its face that the bill of exceptions was regularly signed, the Supreme Court cannot presume against the record. *United States v. Hodge*, 6 *How*. 279-282, 12 L. ed. 439, Jan. T., 1848.

A statement of facts filed by the judge without the consent of the parties after the case is removed by the service of a writ of error, or even after the writ is issued, must be treated as a nullity in the Supreme Court. *Generes v. Bonmener*, 7 *Wall*. 564-565, 19 L. ed. 227, Dec. T., 1868.

By filing with the clerk an affidavit, not incorporated in the bill of exceptions, a party cannot bring into the record evidence of what took place on the trial. *Nelson v. Flint*, 166 *U. S.* 276-279, 41 L. ed. 1003, Oct. T., 1896.

Neither the rulings of the court in admitting or excluding evidence, nor the instructions given by the court to the jury are a part of the record, unless made so by a proper bill of exceptions. *Storn v. United States*, 94 *U. S.* 76-77, 24 L. ed. 42-43, Oct. T., 1876.

Error apparent on the record, whether in the foundation, proceedings, judgment or execution of the suit, may be re-examined and corrected without a bill of exceptions. *Ib.* 77.

An incurable and material defect in the pleadings and verdict as they appear in the record to have existed in the court below, may be considered by the court, though not noticed in the bill of exceptions nor suggested in the argument. *Garland v. Davis*, 4 *How*. 131-143, 11 L. ed. 912, Jan. T., 1846.

Where the defendant was not served with process or the proceedings were irregular and void, or the original process unauthorized by

law, the judgment may be reversed, although there be no bill of exceptions, agreed statement of facts, or special verdict. *New Orleans Railroad v. Morgan*, 10 *Wall.* 256-261, 19 L. ed. 892, Dec. T., 1869.

Where demurrer to the declaration is improperly sustained and judgment rendered, the cause may be examined upon a writ of error without a bill of exceptions. *Rogers v. Burlington*, 3 *Wall.* 661, 18 L. ed. 82, Dec. T., 1865.

Where, upon a writ of error, the parties fail to raise an objection to the want of jurisdiction of the court below, the Supreme Court may, of its own motion, inquire into the question without any special exception being taken. *Fernandez y Perez v. Perez y Fernandez*, 202 *U. S.* 80-100, 50 L. ed. 949, Oct. T., 1905.

In case of special findings by the court, in a cause tried without a jury, no exception is necessary to raise the question whether the facts found support the judgment. *Seeberger v. Schlesinger*, 152 *U. S.* 581-586, 38 L. ed. 562, Oct. T., 1893.

Prior to the Act of Mar. 3, 1865, upon an action at law in which the parties waived a jury trial and submitted the facts to the court upon evidence, the Supreme Court had no authority to revise the Circuit Court's opinion upon the admission or rejection of testimony, or upon any other question of law growing out of the evidence. *Campbell v. Boyreau*, 21 *How.* 223-226, 16 L. ed. 96, Dec. T., 1858.

Where a cause is tried by the court as allowed by the Act of Mar. 3, 1865, 13 *Stats. L.* 501, sec. 649, *Rev. Stats., U. S. Comp. Stats.* 1901, p. 525, the finding of facts has the same effect as the verdict of a jury and is conclusive as to the facts so found. Whether the facts found require a judgment for the plaintiff or defendant is matter of law, and the ruling of the court on it can be reviewed in an appellate court. The court announces the method of reviewing the findings under this act, as follows:

(1) If the verdict be a general verdict only such rulings of the court in the progress of the trial can be reviewed as are presented by a bill of exceptions or as may arise on the pleadings.

(2) In such case the bill of exceptions cannot be used to bring up the whole testimony for review any more than in a trial by jury.

(3) If the parties desire a review of the law involved in the case they must either get the court to find a special verdict, which raises the legal propositions, or they must present to the court their propositions of law and require the court to rule on them.

(4) Objection to the admission or exclusion of evidence, or to such ruling on the propositions of law as the party may ask, must appear

by bill of exceptions. *Norris v. Jackson*, 9 *Wall.* 125-128, 19 L. ed. 609, Dec. T., 1869.

Where a cause is tried by the court without a jury, as provided in secs. 649, 700, *Rev. Stats. (U. S. Comp. Stats. 1901, pp. 525, 570)*, no bill of exceptions is required to bring upon the record the findings, whether general or special. To authorize a judgment there must be findings of fact which must appear of record. *Insurance Co. v. Boon*, 95 *U. S.* 117-124, 24 L. ed. 396, Oct. T., 1877.

The only office of a bill of exceptions is to bring upon the record rulings that without it would not appear. *Ib.* 125.

Where judgment has been rendered in a cause tried by the court, a special finding of facts may be filed at the subsequent term, *nunc pro tunc*, by special order of the court. *Ib.* 124. To same effect, *McGavock v. Woodlief*, 20 *How.* 221-225, 15 L. ed. 884, Dec. T., 1857.

NOTE. In *Flanders v. Tweed*, 9 *Wall.* 425-429, 19 L. ed. 679, the court refused to treat as part of the record a statement of facts filed by the judge three months after the rendition of the judgment.

Where no exceptions appear on the record to rulings of the court in the admission or rejection of evidence, and the evidence stated in the bill of exceptions is legally sufficient to justify the conclusion reached by the court in the trial of the cause without a jury, no error can be predicated upon its conclusions of fact, which are conclusive. *Booth v. Tiernan*, 109 *U. S.* 205-206, 27 L. ed. 908, Oct. T., 1883.

Where a cause is tried by the court and certain propositions of law are announced by the judge as held by him, no specific exceptions can be taken to them, and they are important only as they affect the question whether the facts found are sufficient to support the judgment. *Jennison v. Leonard*, 21 *Wall.* 302-307, 22 L. ed. 541, Oct. T., 1874.

Where the case is tried by the court under secs. 649, 700, *Rev. Stats. (U. S. Comp. Stats. 1901, pp. 525, 570)*, the Supreme Court can only inquire whether the facts found in the special findings, considered in connection with the pleadings, are sufficient to sustain the judgment, and whether any error was committed upon rulings on matters of law properly preserved by bill of exceptions. A stipulation of counsel as to evidence bearing on the findings appearing in the record will not be noticed. *Ft. Worth City Co. v. Smith Bridge Co.*, 151 *U. S.* 249-300, 38 L. ed. 169, Oct. T., 1893.

As the court has power to try and determine a cause upon an oral waiver of a jury, where the record fails to show that there was any stipulation in writing for such waiver, the record and bill of exceptions reciting only that there was a waiver of a jury, the Supreme Court has

law, the judgment may be reversed, although there be no bill of exceptions, agreed statement of facts, or special verdict. *New Orleans Railroad v. Morgan*, 10 *Wall.* 256-261, 19 L. ed. 892, Dec. T., 1869.

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Where a cause is tried by the court as allowed by the Act of Mar. 3, 1865, 13 *Stats. L.* 501, sec. 649, *Rev. Stats., U. S. Comp. Stats.* 1901, p. 525, the finding of facts has the same effect as the verdict of a jury and is conclusive as to the facts so found. Whether the facts found require a judgment for the plaintiff or defendant is matter of law, and the ruling of the court on it can be reviewed in an appellate court. The court announces the method of reviewing the findings under this act, as follows:

(1) If the verdict be a general verdict only such rulings of the court in the progress of the trial can be reviewed as are presented by a bill of exceptions or as may arise on the pleadings.

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by bill of exceptions. *Norris v. Jackson*, 9 *Wall.* 125-128, 19 L. ed. 609, Dec. T., 1869.

Where a cause is tried by the court without a jury, as provided in secs. 649, 700, *Rev. Stats.* (*U. S. Comp. Stats.* 1901, pp. 525, 570), no bill of exceptions is required to bring upon the record the findings, whether general or special. To authorize a judgment there must be findings of fact which must appear of record. *Insurance Co. v. Boon*, 95 *U. S.* 117-124, 24 L. ed. 396, Oct. T., 1877.

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Where the case is tried by the court under secs. 649, 700, *Rev. Stats.* (*U. S. Comp. Stats.* 1901, pp. 525, 570), the Supreme Court can only inquire whether the facts found in the special findings, considered in connection with the pleadings, are sufficient to sustain the judgment, and whether any error was committed upon rulings on matters of law properly preserved by bill of exceptions. A stipulation of counsel as to evidence bearing on the findings appearing in the record will not be noticed. *Ft. Worth City Co. v. Smith Bridge Co.*, 151 *U. S.* 249-300, 38 L. ed. 169, Oct. T., 1893.

As the court has power to try and determine a cause upon an oral waiver of a jury, where the record fails to show that there was any stipulation in writing for such waiver, the record and bill of exceptions reciting only that there was a waiver of a jury, the Supreme Court has

no authority to consider exceptions taken at the trial. *Bond v. Dustin*, 112 *U. S.* 604-607, 28 L. ed. 836, Oct. T., 1884.

The sufficiency of the pleadings to support the judgment is reviewable, though the record fails to show a written stipulation to waive a jury. *Ib.* 608.

That a stipulation in writing to waive a jury was made, as a condition upon which a review is allowed by the Act of Mar. 3, 1865, must appear in the findings, or in the bill of exceptions, or in the record of the judgment entry. *Ib.* 608.

If a jury is waived, and the court chooses to find generally for one side or the other, the losing side has no redress except for the admission or rejection of evidence. *Dirst v. Morris*, 14 *Wall.* 484-490, 20 L. ed. 723, Dec. T., 1871.

Where a jury is waived as provided in the Act of Mar. 3, 1865, the finding of the court may be either general or special; where general the parties are concluded by the determination of the court except in cases where exceptions are taken to the rulings of the court in the progress of the trial, when such rulings may be reviewed in the Supreme Court; but the findings of the court, if general, cannot be reviewed by bill of exceptions or in any other manner. *Insurance Co. v. Folsom*, 18 *Wall.* 237-248, 21 L. ed. 833, Oct. T., 1873.

Facts found by the trial court where a jury is waived under the Act of 1865 are equivalent to a special verdict, and the Supreme Court will not examine the evidence on which the finding is founded. The court cannot be required to make a special finding. The bill of exceptions brings up nothing for revision except what it would have done had there been a jury trial. *Ib.* 249.

If the general finding is accompanied with an authorized special statement of the facts there may be a review as to the sufficiency of those facts to support the judgment. *Ib.* 254.

Under the statutes providing for waiver of a trial by jury, secs. 649-700, *Rev. Stats. (U. S. Comp. Stats., 1901, pp. 625, 700)*, when there are special findings, they must be findings of the ultimate facts, and not the evidence from which such facts might be, but are not, found. *Wilson v. Merchants' L. & T. Co.*, 183 *U. S.* 121-126, 46 L. ed. 116, Oct. T., 1901.

If an agreed statement contain certain ultimate facts, and also other facts of an evidential character only, from which a material ultimate fact may be inferred, but which is not agreed upon or found by the court, the appellate court cannot find such ultimate fact and cannot decide the case on the ultimate facts agreed upon without reference to such other facts, but is limited to the general finding by the trial court. *Ib.* 127.

Such an agreed statement of facts cannot be regarded as a substantial compliance with the statute. *Ib.* 129.

Where there was no general verdict of a jury and no special verdict in any form known to the common law, and no waiver in writing of a jury trial, and no such finding of the court upon the facts as is provided for by sec. 649, *Rev. Stats. (U. S. Comp. Stats. 1901, p. 525)*, the Supreme Court reviewed the case on a writ of error, where the parties filed a written stipulation agreeing upon the facts. *Geekie v. Kirby Carpenter Co.*, 106 *U. S.* 379-383, 27 L. ed. 159, Oct. T., 1882.

Where the special findings embrace all the issues raised by the pleadings and the conclusions of law made by the Circuit Court are erroneous, the Supreme Court will reverse the judgment, and direct such judgment to be entered as the special findings require, instead of awarding a new trial. *Fort Scott v. Hickman*, 112 *U. S.* 150-165, 28 L. ed. 640, Oct. T., 1884.

It is improper to prepare the bill of exceptions so as to attempt to secure a re-examination of the facts in the appellate court. *Duncan v. The Francis Wright*, 105 *U. S.* 381-389, 26 L. ed. 1102.

The manner and time of settling a bill of exceptions are regulated by the Acts of Congress or where the statutes are silent by the rules of the Federal courts.

When there are no acts of Congress or rules of the Federal courts, then the manner and time of proceedings, as the foundation for removal of a cause upon writ of error from one Federal court to a higher Federal court must conform to the rules of the common law or to the ancient English statutes.

Section 914, *Rev. Stats. (U. S. Comp. Stats. 1901, p. 684)*, regulating the practice in the Federal courts does not require conformity to the practice in the State courts as to the time and manner of settling a bill of exceptions. *Ex parte Chateaugay Ore, etc., Co.*, 128 *U. S.* 544-555, 32 L. ed. 512.

Though a State statute provides that when charges have been taken down by a reporter, the questions presented in such charges need not be excepted to or embodied in a bill of exceptions, such State statutes do not control proceedings in the Federal courts, sitting in that State, and it is necessary for the bill of exceptions to show the proceedings had. *St. Clair v. United States*, 154 *U. S.* 134-153, 38 L. ed. 943, Oct. T., 1893.

A court of errors cannot consider a bill of exceptions that has not been signed by the judge who tried the cause, and such failure or omission cannot be supplied by a stipulation of counsel, or the parties, of the correctness of the bill. The only remedy, if the judge who tried the case is dead or incapacitated, is for his successor to grant a new trial. *Malony v. Adsid*, 175 *U. S.* 281-286, 44 L. ed. 166, Oct. T., 1899.

It is not usual or necessary to reduce bills of exception to form and to obtain the signature of the judge during the progress of the trial. This may be done afterwards during the term. Exceptions need only be noted at the time made and may be reduced to form within a reasonable time after the trial is over. Such time depends on the nature of the bill, and if applied for within the term is left to the discretion of the trial judge. *Hunnicutt v. Peyton*, 102 U. S. 333-354, 26 L. ed. 116, Oct. T., 1880.

Exceptions are not waived by suing out a writ of error before obtaining the signature thereto of the trial judge. *Ib.* 354.

Where a rule of court required presentation of the bill for signature, within five days, *Held*, the judge before whom the exceptions were noted might depart from the rule in order to effectuate justice. *Held*, further, that where the bill was signed within a time allowed during the term, it was not necessary it should appear on its face to be signed and filed *nunc pro tunc*, as of the date of the verdict. *Ib.* 357.

That a bill of exceptions prepared after trial should appear on its face as if actually reduced to form and signed during the term as declared, by Mr. Justice Duval in *Walton v. United States*, 9 *Wheat.* 651-658, disapproved; holding it unnecessary that the bill should be signed *nunc pro tunc* or antedated. *Ib.* 358.

Exceptions must show that they were taken and reserved by the party at the trial, and where the bill of exceptions was presented to the judge during the term, and the facts warrant an implied consent to further time beyond the term for settling the exceptions, the bill may be signed after adjournment. *United States v. Breitling*, 20 *How.* 252-254, 15 L. ed. 902, Dec. T., 1857.

Though a rule of court provides that no bill of exceptions can be signed after the adjournment of the court during which the exception is taken, unless by the consent of counsel in writing, *Held*, it is always in the power of the court to suspend its own rules, or to except a particular case from their operation, whenever the purposes of justice require it. *Ib.* 254.

Anciently a bill of exceptions was required to be sealed, but it is sufficient in the United States courts if it be signed by the judge, sec. 953, *Rev. Stats.* (*U. S. Comp. Stats.* 1901, p. 696). *Staunton v. Embry*, 93 U. S. 548-555, 23 L. ed. 985, Oct. T., 1875.

It is always allowable if an exception is seasonably taken and reserved, that it may afterward be put in form and filed in the case within the time settled by the order of the judge who presided at the trial (made during the term). *Ib.* 555.

NOTE. The case last cited does not state that an order extending the time was made, its language being, "It appears by the record that the exceptions were taken at the trial of the cause and that the bill of exceptions was signed by the judge at the request of the defendant

and filed in the case *nunc pro tunc*, which brings the case within the settled practice of the courts of error even if governed by the strictest rules of common law."

The decision in *Pomeroy's Lessee v. Bank*, 1 *Wall.* 592, and other cases determined prior to 1872, holding that a bill of exceptions must be sealed, are no longer applicable.

The true rule, to which, except under very extraordinary circumstances, there should be no exceptions without an express order of the court during the term or the consent of the parties, requires exceptions taken at the trial to be signed and filed not later than the term at which the judgment was rendered. *Muller v. Ehlers*, 91 *U. S.* 249-251, 23 *L. ed.* 320, Oct. T., 1875.

An order made at the ensuing term after judgment, directing that a bill of exceptions be filed *nunc pro tunc* as of the date of the judgment, when no extension of time was granted during the term, and no consent given for the signing of the bill thereafter, is a nullity; and though the bill of exceptions is returned as a part of the record, it will not be considered by the Supreme Court. *Ib.* 250.

After the term has expired all authority of the court below to amend a bill of exceptions allowed and filed is at an end, unless the court's control over the case has been reserved by order or rule.

Any fault or omission in framing or tendering a bill of exceptions due to the act of the party and not of the court, cannot be amended at a subsequent term, as a misprision of the court in recording inaccurately or omitting to record an order of the court might be. *Bank v. Eldred*, 143 *U. S.* 293-298, 36 *L. ed.* 163, Oct. T., 1891.

NOTE. In this case subsequent to the term the cause was determined, the trial judge amended the bill of exceptions to supply omissions therein showing that rulings were excepted to, and again signed the bill *nunc pro tunc* as within the time originally signed.

If the party does not at once file his bill of exceptions he should move the judge to assign a reasonable time within which he may file it, unless the judge has made an express order in term, allowing a period after the term to prepare the bill; if signed after the term, it must be understood to be a matter of consent between the parties. *Bradstreet v. Thomas*, 4 *Pet.* 102-107, 7 *L. ed.* 798, Jan. T., 1830.

The Supreme Court will not order a particular bill of exceptions to be signed by a judge where he declares the same not conformable to the truth. *Ib.* 102.

The record must show the exception as taken at that stage of the trial when its cause arose. The time and manner of placing the evidence of the exception formally on the record are matters belonging

to the practice of the court at which the trial is held. It is for each court to secure by its rules that prompt attention to the subject necessary to the preservation of the actual occurrences on which the validity of the exception depends, and so to administer those rules that no artificial or imperfect cases shall be presented in the appellate court for adjudication. *Turner v. Yates*, 16 *How.* 14-29, 14 L. ed. 831, Dec. T., 1853.

Where the language of the bill of exceptions implies that the exceptions were taken only at the time of tendering the bill to be signed, which was not until the next term after the trial, the errors assigned cannot be considered. The bill must show that the exception was seasonably taken and duly allowed. *United States v. Carey*, 110 *U. S.* 51-52, 28 L. ed. 67, Oct. T., 1883.

It must appear from the transcript not only that instructions were given or refused at the trial, but that the party who complains of them excepted to them while the jury were at the bar. If the exceptions are made and noted after the trial, the charge of the court or its refusal to charge as requested, form no part of the record, and cannot be carried before the appellate court by writ of error. *Phelps v. Mayer*, 15 *How.* 160-161, 14 L. ed. 644, Dec. T., 1853.

It need not be drawn up in form and signed before the jury retire, but it must be taken in open court and must appear by the certificate of the judge who authenticates it to have been so taken. *Ib.* 161.

The above rule is adhered to for the purpose of justice, because the court has an opportunity upon objection to reconsider or explain its opinion, and if the objection is to evidence the opposing party may remove it by further testimony if apprised in time. *Ib.* 161.

Where the bill of exceptions shows that the exceptions were taken and allowed at the trial and that the bill was prepared and presented to the judge for signature, within a time stipulated between the parties, and it was thereafter stipulated that the judge might delay his signature to the bill until a named time, but the bill was not allowed and signed until a date subsequent to that named in the second stipulation, and after the writ of error was made returnable, and during a subsequent term of the trial court, *Held*, that the appellant should not be prejudiced by the delay of the judge and a motion to strike out the bill of exceptions was denied. *Davis v. Patrick*, 122 *U. S.* 138-143, 30 L. ed. 1092, Oct. T., 1886.

Where the court, during the term, makes an express order, giving time to prepare and file a bill of exceptions, and the bill is presented to the judge within that time, he may enter a further order continuing the cause for the purpose of settling and signing the bill of exceptions,

and if the bill is finally signed within the time named in the second order, it will be held to have been duly signed, and objections that it was signed after the expiration of the term, will not be allowed, although the signing was against the protest of the objecting party. *Ward v. Cochran*, 150 *U. S.* 597-603, 37 L. ed. 1196, Oct. T., 1893.

The bill of exceptions may be signed after the expiration of the term at which the judgment was rendered, if done by consent of the parties given during the term. *Waldron v. Waldron*, 156 *U. S.* 361-378, 39 L. ed. 457, Oct. T., 1894.

Where there is nothing in the record from which it can be inferred that suit was pending at the date named in the bill of exceptions as that on which the exceptions were taken, but the certificate to the bill shows that it was regularly allowed upon the trial, the certificate is conclusive upon the court and the exceptions must be regarded as duly taken, though the date stated in the bill is the eighth of April, 1848, and the record shows that the trial took place on the seventh and eighth of May, 1849, the date, 1848, will be considered as a clerical mistake. *United States v. Wilkinson*, 12 *How.* 246-252-253, 13 L. ed. 976, Dec. T., 1851.

Where the statement of the exception taken, as made in the bill, itself shows the error of the trial court, if there is any fact which makes against such error, it ought to be shown by the opposite party, and set forth in the exception. *Ib.* 253.

Where it clearly appears that the rulings of the court were excepted to in proper time and not afterward, the Supreme Court will not allow the right of a review to be defeated because the judge was careless in the use of words, or because the bill of exceptions is unskillfully drawn. *Simpson v. Dall*, 3 *Wall.* 460-473, 18 L. ed. 266, Dec. T., 1865.

By proceeding to introduce testimony in his own behalf, defendant waives his exception to a refusal to direct a verdict in his favor at the close of plaintiff's evidence. The motion may be renewed upon the conclusion of the entire testimony. *Wilson v. Haley Live Stock Co.*, 153 *U. S.* 39-43, 38 L. ed. 630, Oct. T., 1893.

The filing of a plea to the merits after demurrer is overruled operates as a waiver of the demurrer, and the demurrer thus abandoned ceases to be a part of the record. *Campbell v. Wilcox*, 10 *Wall.* 421, 19 L. ed. 973, Dec. T., 1870.

Pleading over to a declaration adjudged good on demurrer is a waiver of the demurrer. *Young v. Martin*, 8 *Wall.* 354-358, 19 L. ed. 419, Dec. T., 1868.

Where a party, upon a trial, excepts to a ruling of the court, but does not stand upon such exception, and acquiesces in the ruling and elects to proceed with the trial, he thereby waives his exception. *Campbell v. Haverhill*, 155 *U. S.* 610–612, 39 L. ed. 281, Oct. T., 1894.

Where in a cause submitted to the court without a jury the defendant moved for judgment in his behalf at the close of plaintiff's case, which motion was denied and duly excepted to and the defendant thereafter proceeded to offer evidence in his own behalf, it was held that the overruling of the motion could not be assigned for error. *Runkle v. Burnham*, 153 *U. S.* 216–222, 38 L. ed. 696, Oct. T., 1893.

By not resting on the motion for a nonsuit, and thereafter offering his own evidence, the defendant waived his motion. *Ib.* 222.

The language used by the judge in his charge to the jury will not supply the place of a transcript of the testimony certified by a bill of exceptions. *Worthington v. Mason*, 101 *U. S.* 149–152, 25 L. ed. 850, Oct. T., 1879.

The Supreme Court can only review error appearing by some ruling on the pleadings or on the state of facts presented to that court. Those facts, apart from the pleadings, can there only be shown by a special verdict, an agreed statement duly signed and submitted to the court below, or by bill of exceptions. When by bill of exceptions complaint is made of the instructions given or refused, it must be accompanied by a distinct statement of testimony given or offered which raised the question to which the instructions apply. *Ib.* 152.

Error cannot be assigned because the trial judge omitted to instruct the jury on a particular aspect of the case however material, unless his attention was called to it with the request to instruct upon it. *Insurance Co. v. Snyder*, 93 *U. S.* 393–394, 23 L. ed. 888, Oct. T., 1876.

Where objection to a question is made and counsel states that he excepts to the opinion of the court, but no exception is actually prayed by the party or signed by the judge, the Supreme Court cannot consider the exception as actually taken, but must suppose it abandoned. *Scott v. Lloyd*, 9 *Pet.* 418–442, 9 L. ed. 187, Jan. T., 1835.

Where the charge of the judge is of a character to mislead the jury the error is one of law and may be corrected in an appellate court; but in every such case the part of the charge to which an exception is addressed ought to be distinctly pointed out. Unless that is done the exception cannot be sustained as a ground for reversing the judgment, as that can only be done for error of law. *Railroad Co. v. Varnell*, 98 *U. S.* 479–485, 25 L. ed. 235, Oct. T., 1878.

The Supreme Court has power to issue a mandamus to a Circuit Court of the United States, requiring the judge before whom the ex-

ceptions were noted, to sign a bill of exceptions. *Crane v. Crane*, 5 *Pet.* 190-192, 8 L. ed. 93, Jan. T., 1831.

Any matter of law advanced by the judge in his charge to the jury, not contained in the points reserved at the trial, may be made matter of exception, but exceptions must not be taken in such form as to bring the whole charge before the appellate court, where the charge sums up all the evidence. *Ib.* 198-199, 8 L. ed. 96.

The truth of the matter contained may not be disputed after the bill is signed. *Ib.* 199.

The practice of spreading the whole charge of the court upon the record discountenanced, and reference made to this rule adopted to suppress it. *Magniac v. Thompson*, 7 *Pet.* 348-390, 8 L. ed. 724, Jan. T., 1833.

The court may dismiss the writ of error where the exceptions are to the whole charge of the court and not to the points ruled by the court. *Stimpson v. Westchester R. Co.*, 4 *How.* 380-401, 11 L. ed. 1030.

The court protests against the obscuring of the merits of the case by making the bill of exceptions a sort of abstract or index of the history of the cause. *Evans v. Patterson*, 4 *Wall.* 224-229, 18 L. ed. 394, Dec. T., 1866.

What a bill of exceptions should contain stated. The practice of sending up bills filled with irrelevant and unnecessary matter condemned. If counsel refuse to comply with the rule the judges of the courts below are advised to withhold their signatures until the bills are prepared freed from matter not essential to explain and point the exceptions. *Lincoln v. Clafin*, 7 *Wall.* 132, 19 L. ed. 108.

The court again condemns the practice of embracing in a bill of exceptions the testimony other than that necessary to present the legal questions raised and noted, and urges compliance with Rule 4. *Johnston v. Jones*, 66 *U. S.* 209-220, 17 L. ed. 120, Dec. T., 1861.

The minutes of the clerk are not sufficient evidence of proceedings in the trial court. To be of any avail, exceptions must be drawn up so as to present distinctly the rulings of the court upon the points raised, and must be signed by the presiding judge. Unless so signed they do not constitute any part of the record which can be considered by an appellate court. No bill is necessary where the error alleged is apparent on the record. *Young v. Martin*, 8 *Wall.* 354-356, 19 L. ed. 419, Dec. T., 1868.

A statement of facts signed by counsel cannot be noticed upon error. *Bethel v. Mathews*, 13 *Wall.* 1-3, 20 L. ed. 556, Dec. T., 1871.

The plaintiff in error cannot take advantage upon exceptions of rulings in his own favor, even if erroneous. *Ib.*

Though the transcript states that at the trial objection to the testimony of witnesses was made and defendant excepted and that the judge gave certain instructions to the jury to which "defendant excepted and assigned the same for error," the clerk's statement that the facts occurred does not enable them to be the subject of review; unless the exception is reduced to writing and signed by the judge it is not a bill of exceptions. *Bank v. Lanier*, 95 *U. S.* 171-173, 24 *L. ed.* 384, Oct. T., 1877.

If either party in an action at law is desirous of preserving the evidence either at the trial, or on a preliminary motion, in order to raise a question of law upon it, he must ask to have it incorporated in a bill of exceptions. This is the only way in which it can be done unless the parties choose to make an agreed statement of facts. Recitals of the clerk contained in the transcript form no part of the record and cannot be considered, where not authenticated by the signature of the judge, through the mode of a bill of exceptions. *Knapp v. Railroad Co.*, 20 *Wall.* 117-121, 22 *L. ed.* 330, Oct. T., 1873.

Though there appears on the transcript what purports to be a copy of the court's charge, marked by the clerk of the trial court, filed in his office among the papers in the case, *Held*, that instructions do not in this way become part of the record. They must be incorporated in a bill of exceptions and thus authenticated by the signature of the judge. *Clune v. United States*, 159 *U. S.* 590-593, 40 *L. ed.* 271, Oct. T., 1895.

The record includes the pleadings, the process, the verdict, the judgment, and such other matters as by some statutory or recognized method have been made part of it. *Ib.* 593.

The duty of the appellate court is limited to determining the validity of exceptions duly framed and presented. Where the bill does not contain any part of a charge given or any exception to it, but undertakes to supply this want by referring to exhibits annexed containing all the evidence introduced at the trial, the whole charge to the jury, and the stenographer's notes of proceedings the court will affirm the judgment without looking into such a record. *Hanna v. Maas*, 122 *U. S.* 24-27, 30 *L. ed.* 1118, Oct. T., 1886.

It being necessary to entitle the excepting party to avail himself of an omission to instruct the jury, that a request for instructions be made, such request must affirmatively appear in the bill of exceptions. *Texas & P. Ry. Co. v. Volk*, 151 *U. S.* 73-78, 38 *L. ed.* 80, Oct. T., 1893.

To constitute a part of the bill of exceptions, a paper not incorporated in the body of the bill must be annexed to it, or so identified by mention in the bill, as to leave no doubt when found in the record that it is the one referred to in the bill of exceptions, or else it will be disregarded. *Leftwitch v. Lecanu*, 4 *Wall.* 187-189, 18 L. ed. 388, Dec. T., 1866.

The court has no power to look into a bill of exceptions beyond the errors noted by the exceptions taken at the time to the rulings of law by the judge, and to the admission or rejection of evidence. Only so much of the evidence given on the trial as is necessary to present the legal questions thus raised and noted may be carried into the bill of exceptions; all beyond serves only to encumber and confuse the record and perplex and embarrass both court and counsel. *Zeller's Lessee v. Eckert*, 4 *How.* 289-298, 11 L. ed. 983, Jan. T., 1846.

On a writ of error the appellate court has no concern of questions of fact or whether the findings of the jury accord with the weight of evidence. For errors of this description a motion for a new trial is the proper remedy. *Ib.* 298.

A motion for a new trial in the Federal courts is a motion addressed to the discretion of the court, whose decision in granting or refusing the same is not a proper subject of a bill of exceptions. *Pomeroy's Lessee v. Bank of Indiana*, 1 *Wall.* 592-598, 17 L. ed. 640, Dec. T., 1863, citing numerous cases.

The minutes of the court or the judge's notes are not a substitute for a bill of exceptions; such entries can only be of benefit on appeal where the party excepting seasonably avails himself of the right to reduce his exceptions to writing and have a bill of exceptions signed by the judge presiding at the trial. The minute entries are only evidence of a right of the party seasonably to demand a bill of exceptions. *Ib.* 598.

Many exceptions may be inserted in one bill of exceptions. *Ib.* 600.

An assignment of errors cannot be availed of to import questions into a cause for the purpose of establishing that a Federal question was decided, where the record does not show that any such question was raised and passed on in the court below. *Missouri Pacific R. Co. v. Fitzgerald*, 160 *U. S.* 556-575, 40 L. ed. 540, Oct. T., 1895.

An exception taken to the Supreme Court of a State that the charge of the court, the verdict of the jury and the judgment below are each against, and in conflict with, the Constitution and laws of the United States, is too general to authorize the Supreme Court to reverse the judgment of the highest State court under sec. 25 of the Act of 1789. The particular right claimed under the Constitution or Act of Congress, and under what clause of the Constitution or Act of Congress the same

was claimed, should be set out on the record. *Maxwell v. Newbold*. 18 *How.* 511-517, 15 L. ed. 509, Dec. T., 1855.

Where a right is set up under an Act of Congress in a State court any matter of law found in the record decided by the highest court of the State can be re-examined by the Supreme Court.

The conclusiveness of the facts found extends to the finding by a State court to whom they have been submitted by waiving a jury, or to a referee where it is so held by State laws. *Bridge Co. v. Kansas Pacific Ry. Co.*, 92 *U. S.* 315-317, 23 L. ed. 516, Oct. T., 1875.

Where a series of instructions to the jury are asked in one prayer and refused as a whole, and there is a general exception to such refusal, if any proposition in the series ought to have been rejected, the refusal of the prayer is not error, although other propositions in the series, if asked separately, ought to have been given. *Harvey v. Tyler*, 2 *Wall.* 328-339, 17 L. ed. 872, Dec. T., 1864.

The principle of justice and fairness to the court which makes the rulings complained of require that the attention of that court be specifically called to the precise point to which exception is taken, that it may have an opportunity to reconsider the matter and remove the ground of objection. *Ib.* 339.

It is the duty of the party taking objection to the admission of evidence to point out the part excepted to when the evidence consists of a number of particulars, so that the attention of the court may be drawn to a particular objection. *Moore v. Bank of the Metropolis*, 13 *Pet.* 302-310, 10 L. ed. 176, Jan. T., 1839.

In examining the admissibility of evidence the court will confine the party to the specific objection taken to it. *Hinde's Lessee v. Longwood*, 11 *Wheat.* 199-209, 6 L. ed. 456, Feb. T., 1826.

Upon a general motion to exclude the whole testimony, the court is not bound to do more than to respond to the motion in the terms in which it is made. Where the evidence taken as a whole is not incompetent it is not error to refuse to exclude such evidence where it does not appear from the bill of exceptions that any particular part of the evidence was objected to and the court moved to exclude it. *Elliott v. Pearsall*, 1 *Pet.* 328-338, 7 L. ed. 169, Jan. T., 1828.

A general objection to the reception of evidence without stating the grounds of objection should not be tolerated. It cannot be expected that upon the offer of testimony, oral or written, at the mere suggestion of an exception, obviously not to the competency of the evidence and not pointing out some definite or specific defect in its character, the court shall itself ascertain its defects which the objector cannot or will

not point out. Such objections are too vague to be considered by the appellate court. *Candem v. Doremus*, 3 *How.* 515-530, 11 L. ed. 712, Jan. T., 1845.

Where the bill of exceptions does not contain the answer made by a witness to a question put and allowed over objection, error cannot be assigned. *Nailor v. Williams*, 8 *Wall.* 107-109, 19 L. ed. 349, Dec. T., 1868.

Where the exception is to a charge that if the testimony of a certain witness is believed, a certain fact is established, the testimony should be set out in the bill of exceptions, or so referred to as to make it part of the record; otherwise the instruction will be presumed to be justified. *Russell v. Ely*, 67 *U. S.* 575-580, 17 L. ed. 260, Dec. T., 1860.

Depositions printed in the record but not incorporated in the bill of exceptions, nor referred to in it so as to make them a part of the record in the case, will not be considered. *Ib.* 581.

Where no objection is taken to the competency or sufficiency of the evidence it is improper to include it in a bill of exceptions. *Pennock v. Dialogue*, 2 *Pet.* 1-15, 7 L. ed. 332, Jan. T., 1829.

If the exception taken is to the refusal to permit an interrogatory, the record must show that the answer related to a material matter involved, or if no answer was given the record must show the offer of the party to prove by the witness the particular facts to which the interrogatory related, and that such facts are material. *Railroad Co. v. Smith*, 21 *Wall.* 255-261, 22 L. ed. 514, Oct. T., 1874.

The party who complains of the rejection of evidence must show that he was injured by the rejection. His bill of exceptions must make it appear that if it had been admitted, it might have led the jury to a different verdict, as required by Rule 21 (Subdivision 2, Clause 2). *Packet Co. v. Clough*, 20 *Wall.* 528-542, 22 L. ed. 409, Oct. T., 1874.

The specification should quote the full substance of the evidence offered, or a copy of the offer as stated in the bill of exceptions. *Ib.* 543.

Where the facts which a competent witness, improperly held incompetent, offered to prove, are not stated in the bill of exceptions, the Supreme Court cannot disregard an exception to the exclusion of the witness upon the idea that the testimony could not have been material, or could not have changed the result of the verdict. *Vance v. Campbell*, 1 *Black*, 427-431, 17 L. ed. 172, Dec. T., 1861.

If a series of propositions be embraced in instructions, and the instructions are excepted to in a mass, if any one of the propositions be

correct, the exception must be overruled. *Johnston v. Jones*, 66 *U. S.* 209-221, 17 L. ed. 120, Dec. T., 1861.

If the entire charge of the court is excepted to in gross and any portion thus excepted to is sound, the exception cannot be sustained. An exception to such portions of a charge as are variant from requests made by a party not pointing out the variances, cannot be sustained. *Beaver v. Taylor*, 93 *U. S.* 46-54, 23 L. ed. 790, Oct. T., 1876.

The court's uniform holding, that a general exception to several propositions embodied in instructions to juries must be overruled if any one of the propositions is correct, applied to cases determined by a referee. A general exception to the action of the trial court in overruling specific objections to the referee's report will not be sustained if any one proposition contained in the report of the referee is good. The exception should direct the attention of the court to the specific proposition or propositions objected to, and separate it or them from the rest. The sufficiency of the evidence to support the findings of the referee cannot be re-examined in the Supreme Court. *Boogher v. Insurance Co.*, 103 *U. S.* 90-93, 26 L. ed. 312, Oct. T., 1880.

The court will not pass upon exceptions to a charge where the pleadings do not show the question of law to which the charge relates, and the bill of exceptions does not set forth or refer to the evidence. *Jones v. Bucknell*, 104 *U. S.* 554-556, 26 L. ed. 842, Oct. T., 1881.

Evidence may be included in a bill of exceptions by appropriate reference to other parts of the record. *Ib.* 556.

Upon appeal, the pleadings and the statements of the bill of exceptions, the verdict and the judgment are the only matters properly before the court. Depositions, exhibits, or certificates, not contained in the bill, cannot be considered by the court (unless therein properly identified and made a part thereof by reference).

It is impossible for the court to know whether the charge to the jury or requests and refusal to charge are correct or erroneous, unless a statement of the evidence is contained in the bill of exceptions. *Reed v. Gardner*, 17 *Wall.* 409-411, 21 L. ed. 665, Oct. T., 1873.

The material facts or proofs on which instructions on points of law rest should be inserted before the instructions in a bill of exceptions, in order that the Supreme Court may see if the points arose on which the instructions are given, and to which the exceptions are taken. *United States v. Morgan*, 11 *How.* 154-158, 13 L. ed. 645, Dec. T., 1850.

Where the object and character of the exceptions are intelligible by means of what is stated by the judge in connection with them, though no preliminary evidence is set out on which the points of law arose, the court will consider them. *Ib.* 159.

A bill of exceptions cannot be taken upon the trial of a feigned issue directed by a court of equity, or if taken can only be used on a motion for a new trial made to that court. If the chancellor thinks the trial has not been a fair one, or for any other reason he desires a new trial, it is in his discretion to order it; but he may proceed with the cause, though dissatisfied with the verdict, and make a decree contrary thereto, if the law and evidence require it. *Johnson v. Harmon*, 94 *U. S.* 371-372, 24 L. ed. 271, Oct. T., 1876.

RULE V—*Process*

1. All process of this court shall be in the name of the President of the United States, and shall contain the Christian names, as well as the surnames, of the parties.

2. When process at common law or in equity shall issue against a State, the same shall be served Process against a State. on the governor, or chief executive magistrate, and attorney-general of such State.

3. Process of subpoena, issuing out of this court, in any suit in equity, shall be served on the defendant sixty days before the return day Subpoena to be served in 60 days. of the said process; and if the defendant, on such service of the subpoena, shall not appear at the return day, the complainant shall be at liberty to proceed *ex parte*.

Clause 1 adopted Feb. 5, 1790, as general Rule 5; published 1 *Cranch*, xvi; 1 *Wheat.* xiv; 1 *Pet.* vi; 1 *How.* xxiv; 21 *How.* vi; 108 *U. S.* 574; amended Oct. Term, 1900, 180 *U. S.* 641, 45 L. ed. 1259.

Clause 2 adopted Aug. 12, 1796, 3 *Dallas*, 335. By mistake omitted from rules published in 1 *Wheat.* and 1 *Pet.*; published in 3 *Pet.* xvii; published as Clause 1 of Rule 10 in 1 *How.* xxiv. Became Clause 2 of Rule 5 in the revision of 1858; published in 21 *How.* vi and in 108 *U. S.* 574.

Clause 3 adopted as Rule 10, Aug. 12, 1796, 3 *Dallas*, 335; published 1 *Cranch*, xvii; 1 *Wheat.* xv; 1 *Pet.* vi; 1 *How.* xxv; published as Clause 3 of Rule 5, 21 *How.* vi; 108 *U. S.* 574.

Rule promulgated Dec. 22, 1911. 222 *U. S.*

Decisions

Congress has passed no act regulating the mode of procedure where the Supreme Court exercises original jurisdiction. *New Jersey v. New York*, 5 *Pet.* 284-287, 8 L. ed. 128, Jan. T., 1831.

In all cases where original jurisdiction is given the Supreme Court by the Constitution it has authority to exercise it without any Act of Congress to regulate process, and it may regulate and mould its process

as will best promote justice. *Ex parte Kentucky v. Dennison*, 24 *How.* 66-97, 16 L. ed. 726, Dec. T., 1860.

Where a State is defendant the governor is its representative and process must be served on him (and on the attorney-general also). *Ib.* 97.

Mandamus is now merely the ordinary process to which when appropriate every suitor is entitled for asserting a right claimed. *Ib.* 97.

Where a writ of error was in accordance with the form transmitted by the clerk of the Supreme Court to the clerks of the Circuit Court under sec. 1004, *Rev. Stats. (U. S. Comp. Stats., 1901, p. 713)*, except that it bore teste of the chief justice of the Supreme Court of Texas and was signed by the chief justice and clerk, and sealed with the seal of that court, *Held*, that the defect might be amended on motion. *Bondurant v. Watson*, 103 *U. S.* 278, distinguished. *Texas Pacific Ry. Co. v. Kirk*, 111 *U. S.* 486-487, 28 L. ed. 481, Oct. T., 1883.

In cases against a State if the State shall neglect or refuse to appear on due service of process, the complainant will be allowed to proceed *ex parte*. *Massachusetts v. Rhode Island*, 12 *Pet.* 755-761, 9 L. ed. 1272, Jan. T., 1838.

In a suit against a State, service of a subpoena is required on both governor and attorney-general of the State. Service upon one and not upon the other is not sufficient. *New Jersey v. New York*, 3 *Pet.* 461-464, 7 L. ed. 742, Jan. T., 1830.

Where the official of a State is the party prosecuting the suit for the State, the citation must be served on him. *De La Lande v. The Treasurer*, 17 *How.* 1-2, 15 L. ed. 93, Dec. T., 1854.

RULE VI—*Motions*

1. All motions to the court shall be reduced to writing, and shall contain a brief statement of the facts and objects of the motion.

2. Forty-five minutes on each side shall be allowed to the
Time allowed for argu- argument of a motion, and no more,
ments. without special leave of the court,
 granted before the argument begins.

3. No motion to dismiss, except on special assignment by
Notice required. the court, shall be heard, unless previous
 notice has been given to the adverse party, or the counsel or
 attorney of such party.

4. All motions to dismiss writs of error and appeals, except motions to docket and dismiss under Rule 9, must be submitted in the first instance on printed briefs or arguments.

Motions to dismiss to be submitted on briefs.

If the court desires further argument on that subject, it will be ordered in connection with the hearing on the merits. The party moving to dismiss shall serve notice of the motion, with a copy of his brief of argument, on the counsel for plaintiff in error or appellant of record in this court, at least three weeks before the time fixed for submitting the motion, in all cases except where the counsel to be notified resides west of the Rocky Mountains, in which case the notice shall be at least thirty days. Affidavits

of the deposit in the mail of the notice and brief to the proper address of the

Proof of service of notice and brief.

counsel to be served, duly post-paid, at such time as to reach him by due course of mail, the three weeks or thirty days before the time fixed by the notice, will be regarded as *prima facie* evidence of service on counsel who reside without the District of Columbia. On proof of such service, the motion will be considered, unless, for satisfactory reasons, further time be given by the court to either party.

5. The court in any pending cause will receive a motion to affirm on the ground that it is manifest that the writ or appeal was taken for delay only, or that the questions on which the decision of the cause depend are so frivolous as not to need further argument. The same procedure shall apply to and control such motions as is provided for in cases of motions to dismiss under paragraph 4 of this rule.

Motion to affirm.

6. Although the court upon consideration of a motion to dismiss or a motion to affirm may refuse to

grant the motion, it may nevertheless, if the conclusion is arrived at that the case is

When cause put on the summary docket.

of such a character as not to justify extended argument, order the cause transferred for hearing to a summary docket. The hearing of the causes on such docket will be expedited, the court providing from time to time for such speedy disposition of the docket as the regular order of business may permit,

and on the hearing of such causes one-half hour will be allowed each side for oral argument.

7. The court will not hear arguments on Saturday (unless Motion-day. for special cause it shall order to the contrary), but will devote that day to the other business of the court. The motion day shall be Monday of each week; and motions not required by the rules of the court to be put on the docket shall be entitled to preference immediately after the reading of opinions, if such motions shall be made before the court shall have entered upon the hearing of a case upon the docket.

Clause 1 adopted January Term, 1838, as Rule 51, 12 *Pet.* viii; published as general Rule 46 in 1 *How.* xxxvii. In the revision of 1858 made Rule 6; published in 21 *How.* vi; made Clause 1 of Rule 6 in the revision of 1884, published in 108 *U. S.* 574.

Clause 2 adopted Dec. 18, 1876, as an additional sentence to Clause 1 of Rule 6, 93 *U. S.* vii; published 108 *U. S.* 575.

Clause 3 adopted at December Term, 1867, 6 *Wall.* v; published 108 *U. S.* 575.

Clause 4 adopted May 6, 1872, 13 *Wall.* xi; published 108 *U. S.* 575.

Clause 5 adopted May 8, 1876, 91 *U. S.* vii. As originally promulgated the right was limited to writs of error to a State court; amended Nov. 4, 1878, extending the right to all writs of error and to appeals, 97 *U. S.* vii; published 108 *U. S.* 575.¹

Clause 6 adopted December 22, 1911.

Clause 7 adopted as Rule 3 (designating Saturday as motion-day), February Term, 1824, 9 *Wheat.* iv; published as Rule 33 in 1 *Pet.* xi and as Rule 34 in 1 *How.* xxii. In the revision of 1858, made Rule 27 and so published in 21 *How.* xv, and Friday named as motion-day. Amended Dec. 14, 1874, to make Monday motion-day, 20 *Wall.* xv; published 108 *U. S.* 575.

Promulgated December 22, 1911. 222 *U. S.*

Decisions

Oral argument is not allowed on motion to dismiss appeals or writs of error. It is only necessary to print so much of the record as will enable the court to act understandingly without referring to the transcript. *Carey v. Railway Co.*, 150 *U. S.* 170-179, 37 L. ed. 1043, Oct. T., 1893.

Notice of a motion to dismiss an appeal which designates no time for the hearing, is irregular and insufficient. *Glenny v. Langdon*, 94 *U. S.* 604-605, 24 L. ed. 237, Oct. T., 1876.

The court will not refuse to hear a motion to dismiss before the term to which the record ought to be returned where its want of jurisdiction

¹ Clause 5 as it stood before the revision at October Term, 1911. There may be united, with a motion to dismiss a writ of error or an appeal, a motion to affirm on the ground that, although the record may show that this court has jurisdiction, it is manifest the writ or appeal was taken for delay only, or that the question on which the jurisdiction depends is so frivolous as not to need further argument.

manifestly appears. *Ex parte Russell*, 13 *Wall.* 664-671, 20 L. ed. 635, Dec. T., 1871.

The court will not hear the motion until the record is presented, and in many cases printed, and where the appellant fails to have the record filed in due time, it may be procured and presented by the appellee. *Ib.* 671.

The court will not decide motions to dismiss before the record is printed where there is any question about the facts upon which the motion rests. To get a decision before printing, the motion papers must present the case in a way which will enable the court to act intelligently without referring to the transcript on file. *Bank v. Insurance Co.*, 100 *U. S.* 43, 25 L. ed. 547, Oct. T., 1879.

Where the court was not furnished with a copy of the certificate of division or with an agreed statement of what it contained, it refused to entertain a motion to dismiss before printing the record. *Water-ville v. Van Slyke*, 115 *U. S.* 290, 29 L. ed. 406, Oct. T., 1885.

Where the want of jurisdiction is patent or requires no investigation of the bill of exceptions, the court will not postpone the question of jurisdiction to the argument upon the merits, but will act upon a motion to dismiss for want of jurisdiction. *Semple v. Hager*, 4 *Wall.* 431-433, 18 L. ed. 402, Dec. T., 1866.

Where copy of the brief and argument had not been furnished opposing counsel who appeared and filed a brief on the merits, such filing of an argument held a waiver of the notice required by the rule. *Thomas v. Wooldrich*, 23 *Wall.* 283-288, 23 L. ed. 136, Oct. T., 1874.

An appeal opens the whole controversy and if the case is within the jurisdiction of the court, a cross-bill will not be dismissed for want of jurisdiction as to the amount in controversy. *Walsh v. Mayer*, 111 *U. S.* 31-38, 28 L. ed. 341, Oct. T., 1883.

Want of jurisdiction, and irregularity of writs of error or appeal are the only grounds for dismissal. Where it appears that a judgment has been rendered which the court has jurisdiction to revise and that it comes up upon proper process duly issued, all other questions must await the final hearing. *Hecker v. Fowler*, 1 *Black*, 95-96, 17 L. ed. 45, Dec. T., 1861.

Where a case is disposed of under a motion to dismiss an order to advance under Rule 32 will not be made. *Aspen Mining Co. v. Billings*, 150 *U. S.* 31-34, 37 L. ed. 987.

In cases coming from Federal courts if there is no error shown by the record, the prevailing party in the Circuit Court is entitled to an

affirmance of the judgment. Hence, though error may be shown by bill of exceptions, or by a demurrer to a material pleading, or may appear by an agreed statement of facts, made a part of the record, or in a special verdict, yet, when all these are wanting it will not be cause to dismiss the suit. *New Orleans R. R. Co. v. Morgan*, 10 *Wall.* 256-261, 19 L. ed. 892, Dec. T., 1869.

In cases brought to the Supreme Court by writ of error to a State court it must appear on the face of the record by express terms or by necessary implication, that some one of the questions described in sec. 25 of the Judiciary Act did arise in the State court, and such question was decided as provided by that section; otherwise the writ of error will be dismissed in the Supreme Court for want of jurisdiction. *Ib.* 261.

Where a cause is brought to the Supreme Court on writ of error issued out under sec. 22 of the Judiciary Act, and all proceedings are regular and correct, it will not be dismissed, though the record does not present any question of law for revision, but the decision must be affirmed. *The Eutaw*, 12 *Wall.* 136-141, 20 L. ed. 278, Dec. T., 1870.

Motions to dismiss may be filed by leave of the court in any case on the calendar before the case is reached on regular call, and such motions are entitled to preference under Clause 6 of Rule 6, but they do not give either party a right to be heard on the merits. *Ib.* 136.

Where the cause is not within the jurisdiction of the court, or where there are material defects in removing it from the subordinate court, the writ of error or appeal may be dismissed on motion. *Ib.* 139.

Appeals are subject to the same rules and restrictions prescribed in cases of writs of error, and though no question of law for revision appears upon the record, where the proceedings are regular, and the case is within the jurisdiction of the Supreme Court, the cause cannot be dismissed on motion but the decision must be affirmed. *Ib.* 141.

Where the court had jurisdiction of a cause removed by writ of error to a State court, but the only Federal question presented on the merits was decided by the court below in accordance with former decisions of the Supreme Court, the motion to dismiss was denied and the motion to affirm was granted. *Swope v. Leffingwell*, 105 *U. S.* 3-4, 26 L. ed. 939, Oct. T., 1881.

Advantage of the limitation for bringing a writ of error or appeal to the Supreme Court may be taken by motion, when either party may avail himself of any objection which appears on the record, without any formal assignment of error or plea; the form of proceeding in the English Courts of Error never having been adopted by the Supreme Court. *Brooks v. Norris*, 11 *How.* 204-208, 13 L. ed. 666, Dec. T., 1850.

There must be color of right to a dismissal to enable a party to unite a motion to affirm, or to warrant an affirmance on motion. *Whitney v. Cook*, 99 *U. S.* 607, 25 L. ed. 446, Oct. T., 1878.

A cause cannot be dismissed on motion because the appeal may have been brought for delay. The parties have the right to be heard upon the merits. *Amory v. Amory*, 91 *U. S.* 356, 23 L. ed. 436, Oct. T., 1874.

Where the record as presented gives sufficient color of a right to a dismissal, upon motion to dismiss or affirm, though the defect in the record is cured by further showing by affidavits, and the motion to dismiss denied, if it is apparent that the appeal or writ of error was taken for delay, the motion to affirm will be granted. *Micas v. Williams*, 104 *U. S.* 556-557, 26 L. ed. 842, Oct. T., 1881.

A motion to affirm cannot be entertained unless there appears on the record at least some color of right to a dismissal. *Davis v. Corbin*, 113 *U. S.* 687-689, 38 L. ed. 1150, Oct. T., 1884.

The failure to annex or return with a writ of error an assignment of errors as required by sec. 997, *Rev. Stats., U. S. Comp. Stats.* 1901, p. 712, does not give sufficient color to a motion to dismiss as to warrant entertaining a motion to affirm. *Independent School District, etc., v. Hall*, 106 *U. S.* 428, 27 L. ed. 237, Oct. T., 1882.

Out of abundant caution a party may bring his cause upon writ of error and also by appeal, but it is unnecessary to docket it twice. If the cause is docketed on writ of error, the court will not on motion docket and dismiss the appeal, but will determine at the hearing which procedure was proper. *Hurst v. Hollingsworth*, 94 *U. S.* 111, 24 L. ed. 31, Oct. T., 1876.

A condition in a bond on appeal with supersedeas that appellants "shall duly prosecute their said appeal with effect and, moreover, pay the amount of expenses and damages rendered, and to be rendered in case the decree shall be affirmed," *Held*, to conform to the requirements of sec. 1000, *Rev. Stats. (U. S. Comp. Stats.* 1901, p. 712), and a motion to dismiss for defect in the form of the bond denied. *Gay v. Parpart*, 101 *U. S.* 391-392, 25 L. ed. 841, Oct. T., 1879.

Where the record certified by the clerk of the court below states that the appeal was taken in open court, no evidence *dehors* the record will be received to impeach its verity or show that the certificate ought not to have been given. The case as therein set forth is the case before the Supreme Court. If the record transmitted is defective or incorrect, a certiorari should be moved for to correct the transcript, though an amendment may be made in the Supreme Court by consent, or a mere

clerical error may be amended there. *Hudgins v. Kemp*, 18 *How.* 530, 15 L. ed. 512, Dec. T., 1855.

A pretended controversy by counsel chosen and paid by the litigant, for the purpose of obtaining the opinion of the court upon a question of law in a mere colorable dispute, where there is no substantial controversy between those who appear as adverse parties, is an abuse of judicial proceedings and punishable as a contempt of court. *Chamberlain v. Cleveland*, 1 *Black*, 419-425, 17 L. ed. 94, Dec. T., 1861.

A fictitious suit instituted to try the rights of third persons not parties to the record, or where there is no real dispute between the plaintiff and defendant, will be dismissed upon motion upon the facts being shown by affidavit. *Lord v. Veazie*, 8 *How.* 251-254, 12 L. ed. 1069, Jan. T., 1850.

Any attempt by a mere colorable dispute to obtain the opinion of the court upon a question of law which a party desires to know for his own interest or purposes, when there is no real controversy between those who appear as diverse parties to the suit, is an abuse which courts of justice will not permit. *Ib.* 255.

A submission may be set aside upon objection of parties collaterally interested in the decision who have united in the employment of counsel to present their defense and contributed to a common fund for the payment of expenses. *Smelting Co. v. Kemp*, 103 *U. S.* 666, 26 L. ed. 313, Oct. T., 1880.

A cause may be dismissed by the competent parties, usually the parties to the record, unless some third party has become possessed of a beneficial interest, and the party to the record become merely nominal.

The fact that an attorney of either party has a lien on the judgment is no objection to the dismissal of the case. *Platt v. Jerome*, 19 *How.* 384-385, 15 L. ed. 624, Dec. T., 1876.

That a party to the record may become merely nominal he must have parted with his interest after the appeal or writ of error sued out. *Barribeau v. Brant*, 17 *How.* 43-46, 15 L. ed. 35, Dec. T., 1854.

The Supreme Court will not dismiss an appeal on the ground of want of jurisdiction in the court below, that question being a proper one for argument when the cause is regularly reached. *Nelson v. Leland*, 22 *How.* 48, 16 L. ed. 270, Dec. T., 1859.

The propriety or impropriety of an order, granting a supersedeas made in the court below, cannot be considered on a motion to dismiss. *Hudgins v. Kemp*, 18 *How.* 530-535, 15 L. ed. 513, Dec. T., 1855.

Certificates of the clerk, given after the record is certified, should be made a part of the transcript by motion to amend, if intended to be

used on a motion to dismiss, on the ground that the court has not acquired jurisdiction. *Ib.* 534.

An appearance by the appellee without making a motion to dismiss during the first term to which the citation is returnable is a waiver of any irregularity in the citation and an admission that he has received notice to appear to the writ. *Chaffee v. Hayward*, 20 *How.* 208, 15 *L. ed.* 815.

RULE VII—*Law Library*

1. During the session of the court, any gentleman of the bar having a case on the docket, and wishing to use any book or books in the law library, shall be at liberty, upon application to the clerk of the court, to receive an order to take the same (not exceeding at any one time three) from the library, he being thereby responsible for the due return of the same within a reasonable time, or when required by the clerk. And in case the same shall not be so returned, the party receiving the same shall be responsible for and forfeit and pay twice the value thereof, and also one dollar per day for each day's detention beyond the limited time.

Books from library had on order of clerk.

2. The clerk shall deposit in the law library, to be there carefully preserved, one copy of the printed record in every case submitted to the court for its consideration, and of all printed motions, briefs, or arguments filed therein.

Record, briefs and printed motions deposited in library.

3. The marshal shall take charge of the books of the court, together with such of the duplicate law books as Congress may direct to be transferred to the court, and arrange them in the conference room, which he shall have fitted up in a proper manner; and he shall not permit such books to be taken therefrom by any one except the justices of the court.

Marshal has charge of library.

Clause 1 adopted as Rule 39 at January Term, 1833, 7 *Pet.* iv; published 1 *How.* xxxiv. In the revision of 1858 made Clause 1 of Rule 7 and so published in 21 *How.* vi; also in 108 *U. S.* 576.

Clause 2 promulgated Oct. 25, 1875, 91 *U. S.* vii; published in 108 *U. S.* 576.

Clause 3 adopted as general Rule 48 at January Term, 1841, with the substitution of clerk for marshal. Made Clause 2 of Rule 7 in the revision of 1858; published in 21 *How.* vii; published as above in 108 *U. S.* 576.

Promulgated Dec. 22, 1911. 222 *U. S.*

RULE VIII—*Writ of Error and Appeal, Return and Record*

1. The clerk of the court to which any writ of error may be directed shall make return of the same, by transmitting a true copy of the record, and of the assignment of errors, and of all proceedings in the case, under his hand and the seal of the court.

Clerk of court below to send up copy of record and of the assignment of errors; how record shall be made up.

In order to enable the clerk to perform such duty and for the purpose of reducing the size of transcripts of record in cases brought to this court by appeal or writ of error, by eliminating all papers not necessary to the consideration of the questions to be reviewed, it shall be the duty of the appellant or plaintiff in error or his attorney to file with the clerk of the lower court, together with proof or acknowledgment of service of a copy on the appellee or defendant in error, or his counsel, a *præcipe* which shall indicate the portions of the record to be incorporated into the transcript of the record on such appeal or writ of error. Should the appellee or defendant in error, or his counsel, desire additional portions of the record incorporated into the transcript of the record to be filed in this court, he shall file with the clerk of the lower court his *præcipe* also, within ten days thereafter (unless the time shall be enlarged by a judge of the lower court or by a justice of this court), indicating such additional portions of the record desired by him.

The clerk of the lower court shall transmit to this court as the transcript of the record in the case only the portions of the record below designated by both parties as above provided.

The parties or their counsel, however, may agree by written stipulation to be filed with the clerk of the lower court the portions of the record which shall constitute the transcript of record on appeal or writ of error, and the clerk in such case shall transmit only the papers designated in such stipulation.

If this court shall find that portions of the record unnecessary to a proper presentation of the case have been

incorporated into the transcript by either party, the court may order that the whole or any part of the clerk's fee for supervising the printing and of the cost of printing the record be paid by the offending party.¹

2. In all cases brought to this court, by writ of error or appeal, to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall Clerk of court below to send up copy of opinion in case. annex to and transmit with the record a copy of the opinion or opinions filed in the case.

3. No case will be heard until a complete record, containing in itself, and not by reference, all the papers, exhibits, depositions, and other proceedings which are necessary to the hearing in this court, shall be filed. Case heard only on complete record.

4. Whenever it shall be necessary or proper, in the opinion of the presiding judge in any district court, that original papers of any kind should be inspected in this court upon writ of error or appeal, such presiding judge may make such rule or order for the safe-keeping, transporting, and return of such original papers as to him may seem proper, and this court will receive and consider such original papers in connection with the transcript of the proceedings. Original papers when to be sent up.

5. All appeals, writs of error, and citations must be made returnable not exceeding thirty days from the day of signing the citation, whether the return day fall in vacation or in term time, and be served before the return day, except in writs of error and appeals from California, Oregon, Nevada, Washington, New Mexico, Utah, Arizona, Montana, Wyoming, North Dakota, South Dakota, Alaska, Idaho, Hawaii and Porto Rico, when the time shall be extended to sixty days and from the Philippine Islands to one hundred and twenty days.² Writ of error and citation returnable within 30 days from signing citation.

¹ Note all of clause one except the first paragraph was added in the revision at the October Term, 1911.

² The exception was clause 4 of Rule 9 of the Rules prior to the revision at October Term, 1911.

6. The record in cases of admiralty and maritime jurisdiction, when under the requirements of law the facts have been found in the court below, and the power of review is limited to the determination of questions of law arising on the record, shall be confined to the pleadings, the findings of fact, and conclusions of law thereon, the bills of exceptions, the final judgment or decree, and such interlocutory orders and decrees as may be necessary to a proper review of the case.

Record in admiralty cases when lower court finds facts and law.

Clause 1 adopted as Rule 11, Feb. 13, 1797, 3 *Dallas*, 356; published 1 *Cranch*, xvii; 1 *Wheat.* xv; 1 *Pet.* vii; 1 *How.* xxv. Made Clause 1 of Rule 8 in the revision of 1858 and so published in 21 *How.* vii; amended Jan. 7, 1884; published 108 *U. S.* 576.

Clause 2 adopted Apr. 28, 1873, 15 *Wall.* v; published in 108 *U. S.* 576.

Clause 3 adopted February Term, 1823, 8 *Wheat.* vi; published as general Rule 30 in 1 *Pet.* x. In the revision of 1858 became Clause 2 of Rule 8; published in 21 *How.* vii and 108 *U. S.* 577.

Clause 4 adopted at February Term, 1817, 2 *Wheat.* vii; published as general Rule 25 in 1 *Pet.* ix and as Rule 26 in 1 *How.* xxix. In the revision of 1858 published as Clause 3 of Rule 8 in 21 *How.* vii; published as amended in 1871 in 108 *U. S.* 577.

Clause 5 adopted as Rule 33 at December Term, 1867, 6 *Wall.* vi. Became Clause 4 of Rule 8 in the revision of May 1, 1871, and so published in 108 *U. S.* 577; amended January 26, 1891, 137 *U. S.* 710.

The last paragraph of Clause 5 adopted as Clause 3 of Rule 63, December Term, 1853, 16 *How.* ix and so published in 21 *How.* viii. By the revision of 1871 became Clause 4 of Rule 9 and so published in 108 *U. S.* 578; amended Jan. 26, 1891, 137 *U. S.* 711; again amended Jan. 29, 1906, 200 *U. S.* 626.

Clause 6 promulgated May 2, 1881, 103 *U. S.* xiii; published in 108 *U. S.* 577.

Promulgated December 22, 1911. 222 *U. S.*

Statutory Provisions

Sec. 1004, *Rev. Stats., U. S. Comp. Stats.* 1901, p. 713, was amended by the Act of Jan. 22, 1912, 37 Stat. 54, to read:

Writs of error returnable to the Supreme Court, or a Circuit Court of Appeals may be issued, as well by the clerks of the District Courts under the seal thereof, as by the clerk of the Supreme Court, or of a Circuit Court of Appeals. When so issued they shall be as nearly as the case will admit agreeable to the form of a writ of error issued by the clerk of the Supreme Court, or the clerk of a Circuit Court of Appeals.

Decisions

The writ of error is the process of the Supreme Court though the clerk of the Circuit (District) Court issue it. It should be served by depositing it with the clerk of the court to whose judges it is directed, and accompany the transcript up to the Supreme Court. The loss or destruction of the original writ will not defeat rights acquired under it. *Massina v. Cavazos*, 6 *Wall.* 355-360, 18 L. ed. 812, Dec. T., 1867.

A writ of error is a commission by which the judges of one court are authorized to examine a record upon which a judgment was given in another court, and on such examination to affirm or reverse it; the writ operates upon the record and brings and submits it to the appellate court for re-examination; but matters not appearing on the face of the record are not supposed to have entered into consideration of the court below. *Suydam v. Williamson*, 20 *How.* 427-437, 15 L. ed. 982, Dec. T., 1857.

Where the facts are not disputed a statement of the same may be drawn up and entered, and submitted directly to the court, or a general verdict may be taken subject to the opinion of the court upon the facts so agreed; in either case a writ of error may be taken after final judgment. *Ib.* 434.

NOTE. This case is exceptionally instructive as authority upon procedure to obtain a review by an appellate court.

The entry of an appeal in the clerk's office is analogous to the issuing of a writ of error; under the rules as they existed in 1848 it was returnable to the next term of the appellate court. The citation was at that time required to be returnable at the same time as the appeal, issued and served before the term of the Supreme Court next succeeding the entry of the appeal. Where the appeal is not made in open court at the term when the final decree is passed, a citation signed by the judge is necessary. *Villabolos v. United States*, 6 *How.* 81-90, 12 L. ed. 356, Jan. T., 1848.

NOTE. By Clause 5, Rule 8, appeals are now returnable within thirty days from the day of signing the citation.

No formal allowance by the Circuit (District) Court of a writ of error from the Supreme Court is required. The writ issues as a matter of right; but when sued out security must be given and a citation to the adverse party signed by a judge of the Circuit (District) Court or a justice of the Supreme Court. *Ex parte Barksdale*, 112 *U. S.* 177-178, 28 L. ed. 692, Oct. T., 1884.

The jurisdiction of the Supreme Court can only be invoked by a party having a personal interest in the litigation. No person or official can sue out a writ of error in behalf of third persons. *Smith v. Indiana*, 191 *U. S.* 138-148, 48 L. ed. 127, Oct. T., 1903.

The signing of citation by the proper judge in a proper case is an allowance of an appeal even without the taking of security. Taking security is not jurisdictional; its omission does not avoid the citation, and permission may be given by the Supreme Court to supply the omission. *Brown v. McConnell*, 124 *U. S.* 489, 31 L. ed. 496.

On appeal taken by the action of the court during the term at which

the decree is rendered no citation is necessary, because all parties are charged with notice; if the necessary security is not taken until after the term a citation is required to bring the appellee into the Supreme Court, but if the case is docketed in time it will not be dismissed before giving appellant an opportunity to give the requisite notice. *Ib.*

Upon an appeal after the term at which the decree is rendered when the citation has been signed by the proper justice or judge, all the appellant has to do to give the Supreme Court jurisdiction of the subject-matter and parties is to serve his citation and docket the case in time. *Ib.*

An appeal in a proper case is a matter of right: it can be taken without any action of the appellate court. A writ of error is the process of the appellate court and is issued only on its authority. *Ib.*

The statute makes no provision as to the form of an allowance of an appeal. The acceptance of security for costs, or costs and damages, if followed when necessary by the signing of a citation is in legal effect, the allowance of an appeal. *Ib.*

NOTE. In *Kitchen v. Randolph*, 93 U. S. 86, 23 L. ed. 810, Chief Justice Waite held that security for costs was to be given when the citation was signed and there could be no valid writ of error without the security.

Although a prayer for an appeal and its allowance constitute a valid appeal even if no bond be given (as bond may be given at any time while the appeal is in effect), yet whether brought up by writ of error or appeal, the record must be filed before the end of the term next succeeding the issue of the writ or the allowance of the appeal, or the Supreme Court is without jurisdiction of the case. The validity of an appeal not perfected in time cannot be restored by an order of the Circuit (District) Court made after the time to appeal has expired. *Edmonson v. Bloomshire*, 7 Wall. 306, 19 L. ed. 91, Dec. T., 1868.

The writ of error like all common-law writs, becomes *functus officio* unless some return is made to it during the term of the court to which it is returnable. *Ib.*

A writ of error brings up only questions of law; it does not bring up questions of equity arising out of the rules and practice of the courts. *Morsell v. Hall*, 13 How. 212-216, 14 L. ed. 118, Dec. T., 1851.

Matters not assigned for error will not be examined, as no such matters are open for argument under the rules. *Clements v. Macheboeuf*, 92 U. S. 418, 23 L. ed. 504.

Held, in A. D. 1832 there was no rule of court or principle of law which estopped an appellant from assuming a ground of appeal not urged in the lower court, though such course be productive of inconvenience. *Watts v. Waddell*, 6 Pet. 402, 8 L. ed. 442.

Sec. 1011, *Rev. Stats., U. S. Comp. Stats.* 1901, p. 715, as amended by Act of Feb. 18, 1875, prohibiting a reversal for "error in ruling any plea in abatement other than a plea to the jurisdiction" does not forbid the review of a decision of a question of jurisdiction depending upon the sufficiency of the service of process. *Goldey v. Morning News*, 156 *U. S.* 518-520, 39 L. ed. 518, Oct. T., 1894.

A writ of error served after its return-day is void; if served before the return-day it may be returned afterwards. *Wood v. Lide*, 4 *Cranch*, 180-181, 2 L. ed. 588, Feb. T., 1807.

Matters resting in the discretion of a subordinate court cannot be assigned for error in an appellate court. *Murphy v. Stewart*, 2 *How.* 263-284, 11 L. ed. 269, Jan. T., 1844.

An appeal allowed, or a writ of error served, is essential to the exercise of the appellate jurisdiction of the Supreme Court, and a cause cannot be brought into that court by agreement of the parties. *County v. Durant*, 7 *Wall.* 694, 19 L. ed. 165, Dec. T., 1868.

Parties who have a substantial interest in the case and have been allowed to intervene in the court below have a right to an appeal. *Williams v. Morgan*, 111 *U. S.* 684-697, 28 L. ed. 565, Oct. T., 1883.

A writ of error may be prosecuted by one of several defendants if it appears from the record that the defendants not joined have been notified in writing and refused to join; summons and severance held unnecessary. *Masterson v. Herndon*, 10 *Wall.* 418, 19 L. ed. 954.

Where there is a joint judgment or decree and one of the parties refuses to join in the writ of error or appeal, the proper practice is to issue a writ of summons, by which the one who refuses to proceed is brought before the court, and if he still refuses an order of severance will be made whereby the party who wishes to do so may sue alone, though this technical mode of procedure will not be insisted upon, if the record shows that the party refusing to join in the appeal has been notified in writing duly served to appear, and either fails or refuses to join. *Ib.*

Held a writ of error in the name of M. D. and others was fatally defective. *Deneale v. Archer*, 8 *Pet.* 526, 8 L. ed. 1032, Jan. T., 1834.

Prior to the act of June 1, 1872, sec. 1005, *Rev. Stats., U. S. Comp. Stats.* 1901, p. 719, *Held* an appeal in the name of F. and Company failed to give jurisdiction and was not amendable. *The Protector*, 11 *Wall.* 82-87, 20 L. ed. 48, Dec. T., 1870.

An amendment will be made, and a motion to dismiss an appeal denied where the bond taken in an appeal in the name of a copartnership

shows the individual names of the partners. *John T. Moore & Company v. Simmons*, 100 U. S. 145, 25 L. ed. 590.

Under sec. 1005, *Rev. Stats. (U. S. Comp. Stats. 1901, p. 719)*, amendments are allowed in writs of error and appeals where there is anything in the record to amend by. *Gumbel v. Pitkin*, 113 U. S. 445-449, 28 L. ed. 1130.

Where the declaration in the case appearing in the record discloses the names of the individuals composing the firm, a writ of error in the firm name may be amended under sec. 1005, *Rev. Stats. (U. S. Comp. Stats. 1901, p. 719)*. Act of June 1, 1872; *Estes v. Trabue Davis and Co.*, 128 U. S. 225-228, 32 L. ed. 438, Oct. T., 1888; *Richardson v. Green*, 130 U. S. 104-110, 32 L. ed. 876.

One of several plaintiffs or defendants affected by a joint decree cannot appeal alone without a valid excuse for not joining the others, shown by a summons and severance, or a request to the other plaintiffs or defendants jointly affected, and their refusal to join in the appeal, or at least a notice to them to appear and their failure to do so, which must appear upon the record of the court appealed from. *Inglehart v. Stanbury*, 151 U. S. 68-72, 38 L. ed. 77, Oct. T., 1893.

So held upon a writ of error, also that the defect is not amendable. *Estes v. Trabue Davis and Company*, 128 U. S. 228, 32 L. ed. 438.

Where it appears by the writ that there were parties to the judgment below not personally named in the writ the cause will be dismissed. *Wilson's Heirs v. Insurance Co.*, 12 Pet. 140-141, 9 L. ed. 1032, Jan. T., 1838.

An amendment presupposes jurisdiction of the case. Where by an oversight of the clerk of the trial court the writ of error was in the name of the defendants, who were satisfied with the judgment when it was evident the writ was intended to be sued out by the plaintiff, *Held*, the writ was matter of substance, essential to jurisdiction, and even where counsel appeared and consented to an amendment, the court was without power to amend the writ of error. *Hodge v. Williams*, 22 How. 87-88, 16 L. ed. 237, Dec. T., 1859.

Since the Act of June 1, 1872 (sec. 1005, *Rev. Stats., U. S. Comp. Stats. 1901, p. 719*), a writ of error in the name of a former administrator may be amended by inserting the name of an administrator substituted in the court below. The authorities on the subject collected. *Walton v. Marietta Chair Co.*, 157 U. S. 342-347, 39 L. ed. 727, Oct. T., 1894.

A writ of error may be amended in its return-day, when a new citation should issue. *National Bank of St. Louis v. National Bank of New York*, 99 *U. S.* 608-610, 25 L. ed. 362, Oct. T., 1878.

Sec. 1005, *Rev. Stats. (U. S. Comp. Stats. 1901, p. 714)*, authorizes the Supreme Court in its discretion to allow an amendment of a writ of error, provided the defect has not prejudiced the defendant in error. Upon motion to amend the return-day of a writ served and for a new citation the court allowed the amendment though less than thirty days intervened before the day to which the amended writ was made returnable. *Ib.*

The provision of sec. 999, *Rev. Stats. (U. S. Comp. Stats. 1901, p. 712)*, is not that citation must be served thirty days before the return-day but that the defendant in error shall have at least thirty days before he can be compelled to go to a hearing. *Ib.*

Held the 32d section of the Judiciary Act of 1789 allowing amendments embraced causes of appellate as well as original jurisdiction: that according to the common law there is nothing in the nature of appellate jurisdiction which forbids the granting of amendments. It has been the practice of the Supreme Court where amendments are necessary to remand the cause to the trial court for that purpose, but where counsel on both sides agree the amendment may be made in the Supreme Court. *Kennedy v. The Bank*, 8 *How.* 586-610, 12 L. ed. 1219.

A writ of error issued with a different return-day from that prescribed by law, or differing in any other material respect from the form transmitted by the clerk of the Supreme Court, under the Act of May 8, 1792, is without authority of law and will not bring up a case to the Supreme Court. *Insurance Co. v. Mordecai*, 21 *How.* 195-202, 16 L. ed. 95, Dec. T., 1858.

Such a writ cannot be amended. The citation can be signed only by the justice or judge who allows the writ of error. *Ib.*

The signature of the clerk of a State court is not fatal, and the writ may be amended. *Miller v. Texas*, 153 *U. S.* 535-537, 38 L. ed. 813, Oct. T., 1893.

Here the writ ran in the name of the President and was tested in the name of the Chief Justice of the Supreme Court of the United States. *Ib.*

A writ of error not sealed is a nullity. *City of Washington v. Dennison*, 6 *Wall.* 495, 18 L. ed. 863, Dec. T., 1867.

A writ of error wanting the "teste" is fatally defective and cannot be amended in the Supreme Court. *Moulder v. Forrest*, 7 *Wall.* 567, 19 L. ed. 154, Dec. T., 1868.

A mistaken date in a writ of error does not vitiate the writ, where regularly issued and served. *O'Dowd v. Russell*, 14 *Wall.* 402, 20 L. ed. 858.

A citation is essential to the validity of a writ of error, without it the writ will be quashed. *Lloyd v. Alexander*, 1 *Cranch*, 365, 2 L. ed. 137.

Citation with due return or waiver by general appearance or otherwise, is indispensable to jurisdiction on appeal. *Alviso v. United States*, 5 *Wall.* 824, 18 L. ed. 492, Dec. T., 1866.

A citation is unnecessary only when the appeal is allowed in open court during the term at which the decree is rendered; the allowance should be entered on the minutes. *Vansant v. Gas Light Co.*, 99 *U. S.* 213, 25 L. ed. 265, Oct. T., 1878.

Though no citation appears in the record it may be proved *aliunde* that it issued. *Innerarity v. Byrne*, 5 *How.* 295, 12 L. ed. 159, Jan. T., 1847.

The writ of error brings up the record; the citation brings the parties before the court. *Cohens v. Virginia*, 6 *Wheat.* 410-411, 5 L. ed. 293.

Citation has not the effect of process of summons; failure to appear is not taken as a default and judgment may not be given against the defendant in error, but the judgment or decree will be re-examined in like manner as if appearance and argument were had. *Ib.* 411.

When an appeal is allowed in open court and perfected during the term at which judgment or decree was rendered, no citation is necessary, but if not perfected until after the term, a citation is necessary to bring in the parties, but if the appeal be docketed at the next term, or the record be ready to docket then, a citation may issue by leave of court, even after the time for taking an appeal.

Where the appeal is allowed at a term subsequent to that of the judgment or decree, a citation is necessary, but may be issued, returnable after the expiration of the time for taking an appeal, if the allowance of the appeal is before.

A citation is a necessary element of an appeal taken after the term. If not issued and served before the end of the next ensuing term of the Supreme Court, and not waived, the appeal becomes inoperative. *Jacobs v. George*, 150 *U. S.* 415-417, 37 L. ed. 1127, Oct. T., 1893.

The citation, if the appeal is allowed in open court, but the security is taken out of court or after the term, is only necessary to show that the appeal has not been abandoned by failure to furnish the security.

It is not jurisdictional and if by accident it has been omitted, a

motion to dismiss an appeal allowed in open court, and at the proper term, will never be granted until an opportunity to give the requisite notice has been furnished; and this whether the motion is made after the expiration of two years from the rendition of the decree, or before. *Dodge v. Knowles*, 114 *U. S.* 436-439, 29 L. ed. 297, Oct. T., 1884.

Where the Supreme Court orders a reargument and that the appellee may be heard, and the order is served on the appellee, such order is equivalent to a citation. *Ib.* 439.

The provision of sec. 5, of Rule 8, that the citation shall be returnable within thirty days is not jurisdictional, and a new citation may be taken out if necessary, by reason of the return-day being made beyond the time prescribed. *Shute v. Keyser*, 149 *U. S.* 649-650, 37 L. ed. 884, Oct. T., 1892.

Until the adoption of the rules promulgated at December Term, 1867 (6 *Wall.* vi, 20 L. ed. 901) all writs of error were made returnable on the first day of the term next after their date, no matter how short the time between the day of the issue and that of the return. Citation followed the writ, and service was required before the return-day. *Ib.*

That the citation was served and made returnable less than thirty days after the writ of error was granted not ground for dismissal. *Segrist v. Crabtree*, 127 *U. S.* 773, 32 L. ed. 323.

Where a citation actually issued upon the allowance of an appeal the court may allow a new citation to issue and be served, retaining the appeal. *Dayton v. Lash*, 94 *U. S.* 112, 24 L. ed. 33, Oct. T., 1876.

Where by amendment allowed the return-day of a writ of error is changed a new citation should issue. *Ib.*

A citation is merely notice to the party, and his appearance in person or by attorney is an admission of the notice on the record, and he cannot afterwards withdraw it. *United States v. Yates*, 6 *How.* 605-608, 12 L. ed. 576, Jan. T., 1848.

Though the appearance is special in terms, if not limited to a motion to dismiss, *Held*, to be a waiver of objection that the citation on a writ of error was served out of the jurisdiction of the court from which it issued. *Renauld v. Abbott*, 116 *U. S.* 277-281, 29 L. ed. 630, Oct. T., 1885.

A general appearance of counsel and motion to dismiss for failure to docket an appeal made after the appeal has become inoperative by the expiration of the term when it should have been docketed, is not a waiver of the citation. *Radford v. Folsom*, 123 *U. S.* 725-727, 31 L. ed. 293, Oct. T., 1887.

Service of subpoena on the attorney or counsel of a party is sufficient; but service upon the executor of counsel of record, deceased, is a nullity. *Bacon v. Hart*, 1 *Black*, 38-39, 17 L. ed. 52, Dec. T., 1861.

That no assignment of errors is annexed to the transcript, as required by secs. 997, 1012, *Rev. Stats.* (*U. S. Comp. Stats.* 1901, pp. 712, 716), is not sufficient to compel a dismissal of the appeal, as under Clause 4 of Rule 21 the court may notice a plain error not assigned. *United States v. Pennsylvania*, 175 *U. S.* 500-502, 44 L. ed. 252, Oct. T., 1899.

Service of citation must be personal upon the adversary or his attorney. The court announced it could not be governed in the matter of its process by State laws; that actual notice or notice as directed by rule or special order must be shown to bring the parties into court. *Held* citation may be served as prescribed for service of subpoena by Rule 13, equity rules. *Tripp v. Santa Rosa, etc., Co.*, 144 *U. S.* 126, 36 L. ed. 372.

Where the defendant below intermarried after judgment and before service of the writ of error, *Held*, service of the citation upon the husband was sufficient. *Fairfax v. Fairfax*, 5 *Cranch*, 19-21, 3 L. ed. 25.

Where a party dies before the appeal is allowed the suit should be revived in the lower court and the citation should be addressed to the actual parties to the suit at the time the appeal is allowed and prosecuted. Where counsel for defendants endorsed upon the citation "I hereby acknowledge service of the within citation" and attached his signature, *held* the attorney of record knew that the appeal was allowed and prosecuted, which is the only purpose of a citation, and had waived all formal objections to the citation issued. *Begler v. Waller*, 12 *Wall.* 142, 20 L. ed. 261.

An objection that citation has not been served should be made by motion to dismiss at the first term of appearance, which should be special and entered for that purpose only. A delay to avail of the objection that notice has not been given may throw the other party off his guard until the limitation of the appeal or writ of error has expired. *Buckingham v. McLean*, 18 *How.* 150-151, 14 L. ed. 91, Jan. T., 1851.

The Judiciary Act does not, in terms, require the approval of the appeal bond in writing; its approval by the judge may be inferred from his signing the citation and witnessing the bond. *Davidson v. Lanier*, 4 *Wall.* 447-453, 18 L. ed. 379, Dec. T., 1866.

A writ of error cannot be treated as a nullity because security is not given, but the appellate court on application will see that the rights of the defendant in error are not thus prejudiced. *Ib.* 453.

Where the date of the citation is manifestly a clerical error, a wrong date does not invalidate it. *Ib.* 453.

The fact that a second writ of error and citation are issued but not served cannot prejudice a writ and citation duly issued and served. *Held* the writ of error need not be allowed by any judge, if it actually issued and was served by copy lodged with the clerk of the court to which it was directed. *Ib.*

Neither the signing of the citation nor the approval of the bond is necessary to give jurisdiction of an appeal taken in due time, but it is essential that the record be filed before the expiration of the term at which the appeal is returnable. *Evans v. State N. Bank*, 134 *U. S.* 330-331, 33 L. ed. 917, Oct. T., 1889.

Where through mistake or accident no bond or a defective bond has been filed the Supreme Court will not dismiss the appeal, except on failure to comply with its order to give the proper security within a prescribed time. *Seymour v. Freer*, 5 *Wall.* 822-823, 18 L. ed. 564, Dec. T., 1866.

The essentials of an appeal are allowance, citation to appellees, or equivalent notice or waiver, and the bringing up of the record to the next term of the Supreme Court. Security for prosecution should be taken by the judge on signing the citation, but if omitted or defectively performed a remedy may be had in the appellate court on motion. *Ib.* 823.

If the transcript is not filed and the cause docketed during the term to which it is made returnable, the writ of error or appeal becomes a nullity and the cause will be dismissed upon motion, or by the court *sua sponte*. *Grigsby v. Purcell*, 99 *U. S.* 505-506, 25 L. ed. 354, Oct. T., 1878.

By sec. 1012, *Rev. Stats.* (*U. S. Comp. Stats.* 1901, p. 716), the limitation of time within which a writ of error may be brought (sec. 1008, *Rev. Stats.*, *U. S. Comp. Stats.* 1901, p. 716), is made applicable to appeals. An appeal is not "taken" until it is presented to the court which made the decree appealed from. *Ib.* 260.

Where an appeal was allowed on the last day on which an appeal could be taken, but not presented and filed with the clerk of the court below until five days after said time had expired, the appeal held ineffectual. *Credit Co. v. Arkansas C. R. Co.*, 128 *U. S.* 258-259, 32 L. ed. 448, Oct. T., 1888.

Where an appeal had been allowed and no return of the record made to the Supreme Court, at the ensuing term, *Held* the appeal ceased to have any effect. *Ib.* 259.

When time for taking an appeal has expired it cannot be arrested or called back by an order *nunc pro tunc*. *Ib.* 260.

If the appeal is taken within the time allowed, the security required by law may be given after the time to appeal has expired. In such case, *Held*, that the time and mode of taking the security for perfecting the appeal are matters of discretion to be regulated by the court granting the appeal, and when its order is complied with the later acts relate back to the time when the appeal was allowed. *The Dos Hermanos*, 10 *Wheat.* 306-311, 6 L. ed. 329, Feb. T., 1825.

A prayer of appeal in due time, though not then granted by the court, secures this right, and no delay by the court in its allowance can impair it. In such case the order for its allowance may be made *nunc pro tunc*. *United States v. Vigil*, 10 *Wall.* 423-426, 19 L. ed. 955, Dec. T., 1869.

By the acceptance of the security by the judge of the Circuit (District) Court or judge or justice of the appellate court, the appeal is allowed. *Sage v. Central R. R. Co.*, 96 *U. S.* 712-715, 24 L. ed. 643, Oct. T., 1877. *Brandies v. Cochrane*, 105 *U. S.* 262, 26 L. ed. 989.

An order allowing an appeal is subject to the power of the trial court over its decrees so long as the appeal remains unperfected and the cause has not passed into the jurisdiction of the appellate tribunal. *Aspen, etc., Co. v. Billings*, 150 *U. S.* 35, 37 L. ed. 988.

Although when the appeal is allowed all jurisdiction is transferred to the appellate court, yet after allowance it remains during the term subject to the power of the lower court. If during the term at which the decree is rendered the allowance is vacated it revokes what has been done and leaves the decree standing. *Goddard v. Ordway*, 101 *U. S.* 745, 25 L. ed. 1043.

That the lower court may retain power during the term to set aside the allowance of an appeal such allowance must be the judicial act of the court itself. The power of a judge of the trial court over the appeal and the security is exhausted when he takes the security and signs the citation. From that time the control over the appeal including the superseas is transferred to the Supreme Court, and even in that court the action of the judge allowing the appeal in the absence of fraud is final, so far as dependent on facts existing at the time, and the court below has no power to proceed to execute its decree. *Draper v. Davis*, 102 *U. S.* 370, 26 L. ed. 122.

An order allowing an appeal is subject to the power of the Circuit (District) Court so long as the appeal remains unperfected and the cause has not passed into the jurisdiction of the appellate tribunal. *Aspen M. & S. Co. v. Billings*, 150 *U. S.* 31-35, 37 L. ed. 988, Oct. T., 1893.

Although the record may have been removed to the appellate court on appeal yet the court below may allow a cross-appeal, sign citation and approve a bond within the two years prescribed by law. *Farrar v. Churchill*, 135 *U. S.* 609, 34 L. ed. 249.

Where a cross appeal is allowed by a Justice of the Supreme Court the petition and order of allowance must be filed in the court below within the time allowed by law. *Ib.*

A cross appeal is not taken until brought to the attention of the court whose decree it questions. *Ib.*

If not perfected until long after the time when by law it should be done, a cross-appeal will be dismissed by the court on its own motion for want of prosecution. *Hilton v. Dickinson*, 108 *U. S.* 165-168, 27 L. ed. 689, Oct. T., 1882.

It is not the duty of the clerk of the court below to furnish a transcript upon the allowance of a writ of error, but only until there is a writ of error to which it can be annexed, and with which it can be returned. *Ex parte Ralston*, 119 *U. S.* 613-615, 30 L. ed. 507, Oct. T., 1886.

The return of a copy of the record of the proper court, under the seal of that court, annexed to the writ of error, is a compliance with the mandate of that writ. *Martin v. Hunter's Lessee*, 1 *Wheat.* 304-361, 4 L. ed. 111, Feb. T., 1816.

It is not essential that the bond required by the 22d sec. of the Judiciary Act be taken by the judge granting the writ of error, when the citation is signed. The provision is directory. If any party be prejudiced by the omission, the Supreme Court can grant him relief. The statute does not require the bond taken to be returned to the Supreme Court; it may be lodged in the court below. *Ib.* 361.

A transcript is sufficiently authenticated if signed by the deputy clerk in the name of the clerk of the court from which the appeal comes, or to which the writ of error is directed, and authenticated by the seal of the court. *Garnau v. Dozier*, 100 *U. S.* 7-8, 25 L. ed. 536, Oct. T., 1879.

Upon a transcript lacking seal of the court and signature of the clerk, the Supreme Court is without jurisdiction of the case, and the writ of error must be dismissed. *Blitz v. Brown*, 7 *Wall.* 693-694, 19 L. ed. 281, Dec. T., 1868.

Leave to perfect a transcript lacking such signature and seal denied, but permission granted to withdraw the record, to be brought up again by a new writ of error. *Ib.* 694.

Where a rehearing has been granted in the court below after the record has been filed in the Supreme Court, the proper practice is for

the court below to request the Supreme Court to return the record in order that it may proceed further in the cause. In a proper case and under proper restrictions the court will make the necessary order upon such an application, but not on application of the parties. *Roemer v. Simon*, 91 *U. S.* 149-150, 23 *L. ed.* 267, Oct. T., 1875.

The original papers to be transmitted, though within the discretion of the court below, should be confined to such as require actual inspection as originals in order to give them their full effect in the determination of the suit. *Craig v. Smith*, 100 *U. S.* 226-232, 25 *L. ed.* 579, Oct. T., 1879.

Papers which properly belong in the files of the court should never be removed except in cases of positive necessity. *Ib.* 233.

Where inspection of the original documents used in the court below is necessary, the court will order the original papers to be sent up. *The Elsinour*, 1 *Wheat.* 439, 4 *L. ed.* 130, Feb. T., 1816.

Where the bill of complaint prayed liberty to refer to the files and records of a former suit in the trial court but the appeal record contained no stipulation that the record of the former suit be considered a part of the bill, and no part was contained in the transcript, *Held*, the appellate court could not consider anything not contained in the bill, and exhibits attached, and could not look into the files and records of the former suit though in the appellate court. *Pacific R. R. of Mo. v. Mo. Pacific R. Co.*, 111 *U. S.* 505, 28 *L. ed.* 503, Oct. T., 1883.

Where upon the record it was found that certain exhibits in the cause which the court below might have called for before making its decree were not set out, the court reversed the decree and remanded the cause for further proceedings, making it obligatory on complainant to produce the contracts on which the suit was founded, with liberty to use the evidence already taken and adduce such other evidence of their respective equities as either may offer. *Levy v. Arrodoendo*, 12 *Pet.* 218, 9 *L. ed.* 1062.

The mere fact that a paper was found among the files in a cause does not in itself make it a part of the record. If not a part of the pleadings or process in the cause it must be put into the record by some action of the court below. *England v. Gebhart*, 112 *U. S.* 502-506, 28 *L. ed.* 812, Oct. T., 1884.

The opinion of the court, transmitted in accordance with sec. 2, Rule 8, does not thus become a part of the record. Where a petition averred the parties were citizens of different States, and the finding of the court was to the contrary, *Held*, that this implied the finding of a fact upon evidence, but as there was no bill of exceptions in the

record and no authentic finding or statement of facts, the court could not re-examine the finding of the lower court. *Ib.* 505.

NOTE. See this case distinguished in *Loeb v. Trustees, etc.*, 179 *U. S.* 472-485, *post*, page 106.

Clause 3 of Rule 8 was not strictly enforced after the records ceased to be in manuscript; and where a stipulation of counsel existed to refer to another record in the Supreme Court, *Held*, the cause should not be dismissed because the record was incomplete. *United States v. Davenport's Heirs*, Dec. T., 1851, 35 L. ed. 1174.

Where a record sent up contained nothing but an agreed statement of facts and the judgment of the Circuit Court on these, *Held*, that the return was not in accordance with Clauses 1 and 3, of Rule 8; that the record must show the proceedings in the lower court, or the Supreme Court is without jurisdiction. *Keene v. Whittaker*, 13 *Pet.* 459, 10 L. ed. 246, Jan. T., 1839.

NOTE. In this case, as also in *Curtis v. Petitpain*, 18 *How.* 109, the 31st Rule referred to is evidently a misprint and should read 30th Rule, being Clause 3 of Rule 8 of present rules.

Appeals in equity are heard upon the pleading and proofs below. No new evidence can be admitted, and the pleadings cannot be amended in the Supreme Court. *Pacific Railroad Co. v. Ketchum*, 95 *U. S.* 1-3, 24 L. ed. 348, Oct. T., 1877.

In appeals from chancery decrees all the testimony on which the judge founds his opinion, unless waived by consent of the parties appearing in the record, should appear on the record. *Connecticut v. Pennsylvania*, 5 *Wheat.* 424-426, 5 L. ed. 125, Feb. T., 1820.

In 1820 the court held that upon an appeal in chancery that all the testimony upon which the trial judge founds his opinion should appear in the record, and reversed a decree founded on oral testimony because it was not sent up in the record. *Conn. v. Penn.*, 5 *Wheat.* 425-426, 5 L. ed. 125.

The laws of the United States have always proceeded on the supposition that the facts as well as the law should be laid before the Supreme Court when called upon to revise decrees in chancery. *Ib.*

An appeal to the Supreme Court in equity and admiralty causes was required by the Act of March 3, 1803, 2 *Stat. L.* 244, sec. 2, to be heard upon a transcript of the bill, answers, and all other proceedings in the trial court. Previously the facts were brought up by a statement of the judge. *Blease v. Garlington*, 92 *U. S.* 1, 23 L. ed. 522.

A certificate of the clerk that certain papers were offered in evidence and motion made for a new trial with the grounds therefor, does not make the documents or evidence a part of the record. The facts and documents should be authenticated by the court itself. *Reed v. Marsh*, 13 *Pet.* 153-156, 10 L. ed. 105, Jan. T., 1839.

Where appellant had selected such papers as he deemed necessary on the hearing of the appeal, and had the same certified as the transcript, the court ordered him to file such omitted papers as appellee deemed necessary, duly certified, by a named time, or the appeal would be dismissed. *Railroad Co. v. Schutte*, 100 *U. S.* 644-648, 25 L. ed. 606, Oct. T., 1879.

The omission of necessary pleadings from the record is contrary to Clause 1 of Rule 8, and in such case under Clause 3 of said rule, the court will refuse to hear the cause; but where it appears that the omitted papers are in the court below, and that the transcript has been long on file without any motion by the defendant in error to dismiss because of failure to comply with the rules, and both parties have submitted the cause on the merits, the plaintiff in error may be allowed to sue out a writ of certiorari to bring up the papers omitted from the transcript. *Parks v. Redfield*, 130 *U. S.* 623-625, 32 L. ed. 1054, Oct. T., 1888.

Attention called to the form of the clerk's certificate which failed to certify that the transcript was "a true copy of the record, and of the assignment of errors, and of all proceedings in the case." *Ib.* 625.

Where the record is certified as containing "certain" pleadings, records, and proceedings, but fails entirely to present any of the questions argued in proper form, the judgment will be affirmed. *Greenhood v. Randall*, 111 *U. S.* 775, 28 L. ed. 596, Oct. T., 1883.

Where the allegations of the bill and answer are not sufficient to place upon the record the facts necessary to determine the cause, the decree may be reversed and the cause remanded with liberty to amend the pleadings. *Estho v. Lear*, 7 *Pet.* 130-131, 8 L. ed. 633, Jan. T., 1833; *Armstrong v. Lear*, 8 *Pet.* 52-73, 8 L. ed. 871, Jan. T., 1834.

The 6th sec. of the Act of Mar. 3, 1891, did not change the limit of two years in which writs of error may issue from the Supreme Court to State courts. *Allen v. So. Pac. R. Co.*, 173 *U. S.* 479-488, 43 L. ed. 778, Oct. T., 1898.

Congress left unchanged, by the Act of 1891, the limitation as to the time within which error may be prosecuted from the Circuit and District Courts of the United States to the Supreme Court (which by sec. 1008, *Rev. Stats.*, is two years). *Ib.* 488.

NOTE. Writs of error and appeals to the Circuit Court of Appeals must be sued out within six months after the entry of the order, judgment, or decree sought to be reviewed. Sec. 11 of the Act of Mar. 3, 1891.

Rule 8 does not require a copy of assignment of errors in the transcript, when no such assignment was filed in the court below. *Gumbel v. Pitkin*, 113 *U. S.* 445, 28 L. ed. 1129.

It is the filing of the writ of error which removes the record from the inferior to the appellate court. In the legal meaning of the term the writ of error is not brought until it is so filed. The day of issue or teste of the writ is immaterial in determining whether the writ has been brought within the period of limitations prescribed by Congress. *Brooks v. Norris*, 11 *How.* 204-207, 13 L. ed. 666.

According to the English practice the defense that the writ was not brought within the time allowed must be presented by plea, and the court could not judicially notice it, as the limitation of time is not an objection to the jurisdiction of the court. It is a defense the defendant in error may waive, or if it appear upon the record may avail himself by motion. *Ib.*

Where the first appeal has not been legally prosecuted, a party has a right, after dismissal of the first appeal, to a second appeal with new citation, if taken before the expiration of the time limited by law. *Yeaton v. Lenox*, 8 *Pet.* 123-124, 8 L. ed. 889, Jan. T., 1834.

The opinion cannot be referred to eke out, control, or modify the scope of the findings, nor to take the place of special findings of fact under secs. 649, 700, *Rev. Stats.* (*U. S. Comp. Stats.* 1901, p. 525, 570). *British Queen M. Co. v. Baker, etc., Co.*, 139 *U. S.* 222, 35 L. ed. 147, Oct. T., 1890; *Saltonstall v. Birtwell*, 150 *U. S.* 417-419, 37 L. ed. 1129, Oct. T., 1893.

The report of the judge who tried the cause before a jury containing a statement of the facts cannot be considered a part of the record. Such report is mere matter *in pais* to regulate the court's discretion as to further proceedings in the trial court and cannot be considered to sustain the jurisdiction of the court which the record fails to show. *Inglee v. Coolidge*, 2 *Wheat.* 363-368, 4 L. ed. 262, Feb. T., 1817.

It was said in *England v. Gebhart*, 112 *U. S.* 502-506, 28 L. ed. 812, that the requirement of Clause 2 of Rule 8, for annexing to the record a copy of the opinion filed in the cause in the trial court, does not make such opinion a part of the record below. *Held*, to mean that under Rule 8 the opinion cannot be referred to for evidence of the facts found

below, upon which the judgment was based. The court may look into the opinion filed and transmitted under Rule 8 to ascertain whether either party in the Circuit Court claimed that a State statute upon which the judgment depended was in contravention of the Constitution of the United States. *Loeb v. Trustees, etc.*, 179 *U. S.* 472-485, 45 L. ed. 288, Oct. T., 1900.

Where the cause is tried by the court without a jury and there is a general finding without any special finding of facts and no agreed statement of facts, the review in the Supreme Court, under sec. 700, *Rev. Stats., U. S. Comp. Stats.* 1901, p. 570, is limited to the sufficiency of the complaint and the rulings, if any, preserved on questions of law during the trial. *Lehnen v. Dickson*, 148 *U. S.* 71-72, 37 L. ed. 373, Oct. T., 1892.

The practice to obtain a review in causes tried by the court without a jury set forth. *Ib.*

After the Act of Feb. 16, 1875 (18 *Stat. L.* 315), the evidence or the opinion of the trial court in admiralty causes had no place in the record to be sent to the Supreme Court, and Clause 6 of Rule 8 was promulgated to exclude it. *The Annie Lindsley*, 104 *U. S.* 185, 26 L. ed. 718, Oct. T., 1881.

This clause of the rule was promulgated with the opinion in the case of *The Adriatic*, 103 *U. S.* 730-731, 26 L. ed. 606, where it is said that as the facts found by the trial court are to be taken as conclusive the testimony is not "necessary on the hearing of the appeal" and so is not required to be sent up by sec. 698, *Rev. Stats. (U. S. Comp. Stats.* 1901, p. 568), and by consent of counsel might be omitted before the amendment of the rule.

Under the Act of Mar. 3, 1887 (24 *Stat. L.* 505, ch. 359, the Tucker Act), a judgment against the Government will be re-examined only when the record contains a specific finding of facts with the conclusions of law thereon, and the court will only inquire whether the judgment below is supported by the facts found. *Chase v. United States*, 155 *U. S.* 489-500, 39 L. ed. 238, Oct. T., 1894.

Where there are specific findings or statements of fact and conclusions of law, a like restriction of appellate inquiry is required in equity and admiralty cases. *Ib.* 500.

The findings of fact on appeal from the Supreme Court of a Territory are conclusive. *Harrison v. Perea*, 168 *U. S.* 311-323, 42 L. ed. 482, Oct. T., 1897.

The same as to findings by the Court of Claims. *Stone v. United States*, 164 *U. S.* 380-382, 41 L. ed. 478, Oct. T., 1896.

On writ of error to the Supreme Court of Louisiana the opinion of that court is to be treated as part of the record. *Eagan v. Hart*, 165 U. S. 188-190, 41 L. ed. 681, Oct. T., 1896.

Upon a submission of issues of fact to a jury in an equity cause for the information of the court, it is not the practice for an appellate court to consider formal objections to rulings in the course of the trial before the jury. *Wilson v. Riddle*, 123 U. S. 608-615, 31 L. ed. 283, Oct. T., 1887.

The practice, upon the submission of such an issue, is to order a jury to be empanelled on the law side of the court, and the verdict to be certified by the clerk to the equity side. *Ib.* 614.

As writs of error from the Supreme Court can only go to the highest court of a State, it will not lie to review the order of a State judge at chambers. *McKnight v. James*, 155 U. S. 685-687, 39 L. ed. 311, Oct. T., 1894.

A writ of error to a State court must be allowed by the chief justice or judge of such court, or by a justice of the Supreme Court, or it will be dismissed for want of jurisdiction. *Bartmeyer v. Iowa*, 14 Wall. 26-28, 20 L. ed. 792, Dec. T., 1871.

Such writ can only issue when one of the questions mentioned in the 25th sec. of the Judiciary Act was decided by the court to which the writ is directed, and the statute (now sec. 999, *Rev. Stats., U. S. Comp. Stats.* 1901, p. 712) requires the citation to be signed by the chief judge of such court or by a justice of the Supreme Court, that there may be some security that such question was decided in the case. *Ib.* 28.

Where a State constitution prescribes which of the associate justices shall act as chief justice in case of the latter's absence, it will be presumed that the justice asserting himself to be the presiding judge and allowing a writ of error and signing the citation is such. *Butler v. Gage*, 138 U. S. 52-56, 34 L. ed. 871, Oct. T., 1890.

A writ of error to a State court allowed by an associate judge or justice, with nothing in the record warranting the inference that such associate judge was at the time acting as chief judge *pro tem.*, does not confer jurisdiction on the Supreme Court, and this though there be in the record an affidavit of counsel that the chief judge was abroad, when the writ was allowed and citation signed. *Havnor v. State of New York*, 170 U. S. 408-410, 40 L. ed. 1088, Oct. T., 1897.

It is sufficient compliance with the rule that upon writ of error from a State court the record should be signed by the clerk without the signature of the judge. It should be authenticated by the seal of the court. *Worcester v. Georgia*, 6 Pet. 515-537, 8 L. ed. 492, Jan. T., 1832.

NOTE. Writ of error, citation, and certificate set out on pages 532-534.

Where the clerk of a State court failed to return the transcript because that court had directed him to make no return to the writ of error, the Supreme Court ordered a rule on the clerk to compel him to return the transcript before a named day. *United States v. Booth*, 18 *How.* 476-477, 15 L. ed. 464, Dec. T., 1855.

Where an authenticated copy of the record of such State court was filed by the plaintiff in error, the court declared that the refusal of the clerk to obey the writ of error could not prevent the exercise of its appellate power, but continued the case until the rule upon the clerk should be answered. *Ib.* 478.

The clerk of the State court persisting in a refusal to make return to the writ of error, an authenticated copy of the record of proceedings in the State court furnished by the plaintiff in error was allowed to be filed, the cause docketed and set for argument. *United States v. Booth*, 21 *How.* 506-512, 16 L. ed. 172, Dec. T., 1858; *Ableman v. Booth*, *Ib.*

The petition for a writ of error to a State court and the assignment of errors therein form no part of the record on which to determine whether a Federal question was determined in the State court. *Corkran Oil Co. v. Arnaudet*, 199 *U. S.* 182-193, 50 L. ed. 150, Oct. T., 1905.

On error to a State court the Supreme Court cannot re-examine the evidence, and when the facts are found below, is concluded by such finding, whether the cause is in chancery, as well as in a case at law. *Egan v. Hart*, 165 *U. S.* 188-189, 41 L. ed. 681, Oct. T., 1896.

RULE IX—*Docketing Cases*

1. It shall be the duty of the plaintiff in error or appellant to docket the case and file the record thereof with the clerk of this court by or before the return-day, whether in vacation or in term time. But, for good cause shown, the justice or judge who signed the citation, or any justice of this court, may enlarge the time, by or before its expiration, the order of enlargement to be filed with the clerk of this court. If the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the cause docketed and dismissed upon producing a certificate, whether in term time or vacation, from the clerk of the court wherein the judgment or decree was rendered, stating the case and certifying that such writ of error or appeal has been duly sued

Record to be filed before return-day; in default defendant may have case docketed and dismissed.

out or allowed. And in no case shall the plaintiff in error or appellant be entitled to docket the case and file the record after the same shall have been docketed and dismissed under this rule, unless by order of the court.

2. But the defendant in error or appellee may, at his option, docket the case and file a copy of ^{Defendant may docket the case and file the} the record with the clerk of this court; ^{record.}

and if the case is docketed and a copy of the record filed with the clerk of this court by the plaintiff in error or appellant within the period of time above limited and prescribed by this rule, or by the defendant in error or appellee at any time thereafter, the case shall stand for argument.

3. Upon the filing of the transcript of a record brought up by writ of error or appeal, the appear- ^{On filing transcript appearance of counsel of} ^{party docketing entered.} ance of the counsel for the party docket- ing the case shall be entered.

Clause 1 adopted at February Term, 1821, as original Rule 32, 6 *Wheat.* vi; published as Rule 29 in 1 *Pet.* x and as Rule 30, 1 *How.* xxx; and, as amended at January Term, 1835, published as Rule 43 in 9 *Pet.* vii; amended December Term, 1853, 16 *How.* ix. Became Clause 1 of Rule 9 in the revision of 1858, 21 *How.* vii; published 108 *U. S.* 577; amended Jan. 26, 1891, 137 *U. S.* 710.

Clause 2 adopted as part of Clause 1 of general Rule 43, January Term, 1835, 9 *Pet.* vii. Became Clause 2 of Rule 3, December Term, 1853, 16 *How.* ix; published in 21 *How.* viii and 108 *U. S.* 578; amended Jan. 26, 1891, 137 *U. S.* 710.

Clause 3 adopted February Term, 1803, as Rule 16, 1 *Cranch*, xviii; published 1 *Wheat.* xvi; 1 *Pet.* vii; 1 *How.* xxvi; omitted from the revision in 1858; adopted as Rule 31, December Term, 1867, 6 *Wall.* v. Became Clause 3 of Rule 9 in the revision of 1871 and so published in 108 *U. S.* 578.

Promulgated Dec. 22, 1911. 222 *U. S.*

NOTE. The præcipe for entry of appearance must be signed by a member of the bar of the Supreme Court. Individual and not firm names must be signed. The same practice obtains in signing motions and briefs.

Decisions

The court will not dispense with the certificate of the clerk required by Rule 9 and dismiss an appeal upon the record lodged by the plaintiff in error or appellant. *Macomb v. Armstead*, 10 *Pet.* 407, 9 L. ed. 473, Jan. T., 1836; *West v. Brashear*, 12 *Pet.* 101, 9 L. ed. 1016, Jan. T., 1838.

The production of the original writ of error and citation without the certificate of the clerk is a substantial compliance with the Rule. *Amos v. Pearle*, 15 *Pet.* 211-212, 10 L. ed. 714, Jan. T., 1841.

Where the certificate produced stated only the term of the court at which the judgment was rendered, *Held*, not in compliance with the

old rule which required the certificate to show that the judgment was rendered thirty days before the commencement of the term of the Supreme Court. *Rhodes v. Steamship*, 10 *How.* 144-145, 13 L. ed. 363, Dec. T., 1850.

A case cannot be docketed and dismissed by the defendant in error unless the plaintiff in error be in default. *Hartsborn v. Day*, 18 *How.* 28-29, 15 L. ed. 272, Dec. T., 1855.

A motion to dismiss under Rule 9 will not be entertained where the writ and citation with the record are returned and filed and the cause docketed before the motion to dismiss. *Sparrow v. Strong*, 3 *Wall.* 97-103, 18 L. ed. 49, Dec. T., 1865.

Where the motion to dismiss and the motion to docket are made at the same time, the motion to docket will be allowed and the motion to dismiss denied. *Owings v. Tiernan*, 10 *Pet.* 24, 9 L. ed. 333, Jan. T., 1836.

Rule 9 presupposes that the writ of error is returnable on the day prescribed by law (formerly on the first day of the Term) and that plaintiff should then file the transcript. *Insurance Co. v. Mordacai*, 21 *How.* 195-201, 16 L. ed. 95.

Held in 1858 plaintiff in error might return the writ of error with the transcript at any time during the term to the first day of which the writ was returnable by the then existing rules, unless meantime the case had been docketed and dismissed, when it could not afterwards be filed without the special order of the Supreme Court. This permission being grantable upon the principle that the term may be considered as one day. *Ib.*

Where a return to the writ of error is duly made and the transcript deposited in the clerk's office in time, the jurisdiction of the court is kept alive and the docketing of the cause after that is mere procedure. If unreasonably delayed the parties may, in the discretion of the court, be subjected to the consequences of the failure to prosecute a suit. Where the transcript has been filed in time and motion to dismiss is delayed until a new writ would be barred by lapse of time, leave may be given to docket the cause after the term. *Edwards v. United States*, 102 *U. S.* 575-577, 26 L. ed. 294, Oct. T., 1880.

The writ of error on appeal becomes inoperative only when the transcript is not filed in time. *Ib.*

Where the appellant having seasonably procured the allowance of the appeal, is prevented from procuring the transcript by the fraud of the other party, or the order of the court or the contumacy of the clerk, and is without laches in his effort to procure the appeal, the

rule requiring the transcript to be filed and the case docketed at the term next succeeding the appeal will not be enforced. *United States v. Gomez*, 3 *Wall.* 752-763, 18 L. ed. 216, Dec. T., 1865.

The rules again announced, with the citation of authorities, that the transcript may be filed during the term succeeding the appeal or taking the writ of error, if not meantime docketed and dismissed on motion of appellee or defendant in error, or if the writ of error or appeal has not lapsed because of the expiration of the term; and that where the appellant is prevented by fraud, the court's order, or the clerk's contumacy it may be filed at a later time; also if the transcript is seasonably filed, the case may be docketed after the term. *Green v. Elbert*, 137 *U. S.* 615-621, 34 L. ed. 735, Oct. T., 1890.

The record cannot be filed after the expiration of the term succeeding the taking of an appeal or bringing of a writ of error because the writ of error becomes *functus officio*, and the appeal has spent its force, but if the record reach the clerk before the succeeding term is closed jurisdiction is kept alive and the court may direct its filing, or if filed by the clerk may treat it as providently done. *Ib.* 621.

Held under the rules as they existed at Oct. Term, 1888, that the Supreme Court had no jurisdiction of an appeal unless the transcript of the record was filed in that court at the next term after the taking of the appeal. *Hill v. Chicago, etc., R. Co.*, 129 *U. S.* 170, 32 L. ed. 653.

The practice where the record is not filed in time is for the defendant in error or appellee to produce a certificate from the clerk, or a copy of the record duly certified, showing that the writ of error or appeal has been taken and that it operates as a supersedeas, when the cause will be docketed and dismissed. *United States v. Fremont*, 18 *How.* 30-37, 15 L. ed. 303, Dec. T., 1855.

Clause 1 of Rule 9 will be not waived because the clerk of the court below certifies that he cannot, consistently with his other duties, prepare the transcript within the time prescribed. *Bulkley v. Honold*, 18 *How.* 40-41, 15 L. ed. 262, Dec. T., 1855.

A cause dismissed because the transcript of the record was not lodged in the office of the clerk until after the return term of the appeal and no attempt made to get it on the docket until another term had passed. *Fayolle v. Texas Pac. Ry. Co.*, 124 *U. S.* 519, 31 L. ed. 534, Oct. T., 1887.

Whether the party elects to file the record and try the cause or to obtain a judgment of dismissal, the certificate of the clerk must state the names of the parties to the suit. "James Clark et al," is too uncertain to make it appear that a party not named was a party to the

suit and enable the record to show that there had been a judgment of dismissal for or against him. *Smith v. Clark*, 12 *How.* 21-22, 13 L. ed. 876, Dec. T., 1851.

Where a case has been docketed and dismissed under Clause 1 of Rule 9 (old Rule 43) and the failure to send up the transcript is shown not to be the fault of the plaintiff in error the Supreme Court has power under sec. 14 of the Act of Sept. 24, 1783, to issue a supersedeas to stay all proceedings in the court below pending a new writ of error sued out. The supersedeas order set out in full. *Hardeman v. Anderson*, 4 *How.* 640-642, 11 L. ed. 1139, Jan. T., 1846.

A judgment of dismissal is a judgment *nisi* and may be stricken out at any time during the term upon motion, unless it appears that the reinstatement works an injustice to the opposite party. *Gwin v. Breedlove*, 15 *Pet.* 284-285, 10 L. ed. 740, Jan. T., 1841; *Bank v. Swan*, 3 *Pet.* 68, 7 L. ed. 605, Jan. T., 1830.

When the motion to dismiss is for want of jurisdiction to entertain the writ of error or appeal, or in other words want of authority of the court below to allow either, the record will be ordered to be printed, briefs filed and the question argued in the usual way. *Ib.*, dissenting opinion Mr. Justice Catron, p. 37.

The order on a motion to dismiss for want of prosecution dismisses the appeal and allows a second; on a motion to dismiss for want of jurisdiction, the dismissal bars another appeal. *Ib.* 37.

The Act of 1789, sec. 22, required that the writ of error should be made returnable on a certain day therein named, *Held* the transcript of the record must be filed at the term next succeeding the issuing of the writ or taking the appeal, in order to bring the case within the jurisdiction of the Supreme Court. Failure to conform to these requirements is not waived by a general appearance. *Carroll v. Dorsey*, 20 *How.* 204-207, 15 L. ed. 804, Dec. T., 1857.

A general appearance cures any defect in the citation, it being process required for a party's benefit which he may therefore waive. *Ib.* 207.

A general appearance by defendant makes his position just what it would have been if he had been brought regularly into court by service of process, and all defects in acquiring jurisdiction over his person are thus cured. *Atkins v. Fiber Co.*, 18 *Wall.* 272-298, 21 L. ed. 843, Oct. T., 1873.

A citation is merely notice to a party, and his appearance in person or by attorney is an admission of the notice on the record which he cannot afterwards withdraw. Such appearance does not preclude the party from moving to dismiss for any sufficient ground except want

of citation. *United States v. Yates*, 6 *How.* 605-608, 12 L. ed. 576, Jan. T., 1848.

Where the plaintiff in error was a member of the bar of the Supreme Court and notified the clerk in transmitting the transcript that the case was one of his own, *Held*, that his appearance was thereby authorized to be entered when the record was filed, or when the cause was docketed. *Green v. Elbert*, 137 *U. S.* 615-622, 34 L. ed. 795, Oct. T., 1890.

Where there is no appearance for plaintiff in error, the defendant may have the plaintiff called, and dismiss the writ of error; or may open the record and pray for an affirmance. *Montalet v. Murray*, 3 *Cranch*, 249, 2 L. ed. 429, Feb. T., 1806.

This statement of the practice became Rule 16. See 3 *Pet.* xvii.

A motion for a rule on the plaintiff in error to file the record before a prescribed day under penalty of dismissal, is not the proper procedure. *Boyd v. Scott*, 11 *How.* 292-293, 13 L. ed. 701, Dec. T., 1850.

A motion in the Supreme Court to require the filing of a new bond made after the entry of the case on the docket of that court will be deemed a waiver of objection that the appeal was not docketed in time. *Waldron v. Waldron*, 156 *U. S.* 361-378, 39 L. ed. 458, Oct. T., 1894.

Counsel who enter their appearance under Rule 9 will be held responsible for all that such entry implies until relieved by substitution of counsel or otherwise. *Alvord v. United States*, 99 *U. S.* 593, 25 L. ed. 399, Oct. T., 1878.

Paragraph 3, Rule 9, was adopted to make some attorney of the court responsible for the due prosecution of every suit. Notice to counsel is ordinarily equivalent to notice to the parties themselves. *Hurley v. Jones*, 97 *U. S.* 318-319, 24 L. ed. 1009, Oct. T., 1878.

The right of an attorney at law to represent his client must exist, but it is not indispensable to produce the evidence of such right. The appearance of a qualified attorney is presumptive evidence of his authority, and no additional evidence has ever been required, whether such appearance is for an individual or a corporation. *Osborne v. The Bank*, 9 *Wheat.* 738-830, 6 L. ed. 226, Feb. T., 1824.

Cross-appeals must be prosecuted like other appeals, otherwise the party will be heard only in support of the decree as it was entered below. *The S. S. Osborne*, 105 *U. S.* 451, 26 L. ed. 1066, Oct. T., 1881.

A motion to docket and dismiss a cause when granted for failure of the appellant to file the record within the time required by the rule

is not an affirmance of the judgment of the court below. It remands the case to the court to have proceedings to carry that judgment into effect. *United States v. Gomez*, 23 *How.* 326-340, 16 L. ed. 556, Dec. T., 1859.

Cases dismissed under Rule 9 are governed by the rule and raise no question of jurisdiction. *Mussina v. Cavazos*, 6 *Wall.* 355-361, 18 L. ed. 812, Dec. T., 1867.

After a cause has been docketed and dismissed it cannot be again docketed without a new appeal, unless by order of the court. *Rogers v. Law*, 21 *How.* 526-527, 16 L. ed. 208, Dec. T., 1858.

RULE X—*Printing Records*

1. In all cases the plaintiff in error or appellant, on docket-
Cash deposit or security for clerk's costs to be given. ing a case and filing the record, shall make such cash deposit with the clerk for the payment of his fees as he may require or otherwise satisfy him in that behalf.

2. The clerk shall cause an estimate to be made of the cost of printing the record, and of his fee for preparing it for the printer and supervising the printing, and shall notify to the
Clerk to estimate costs of printing record.— Unless paid before case reached it shall be dismissed. party docketing the case the amount of the estimate. If he shall not pay it within a reasonable time, and for want of such payment the record shall not have been printed when a case is reached in the regular call of the docket, the case shall be dismissed.

3. Upon payment of the amount estimated by the clerk,
Thirty copies of record to be printed. thirty copies of the record shall be printed, under his supervision, for the use of the court and of counsel.

4. In cases of appellate jurisdiction the original transcript on file shall be taken by the clerk to the printer. But the
Original transcript used by printer. clerk shall cause copies to be made for the printer of such original papers, sent up under Rule 8, sec. 4, as are necessary to be printed; and of the whole record in cases of original jurisdiction.

5. The clerk shall supervise the printing, and see that the

printed copy is properly indexed. He shall distribute the printed copies to the justices and the reporter, from time to time, as required, and a copy to the counsel for the respective parties.

6. If the actual cost of printing the record, together with the fee of the clerk, shall be less than the amount estimated and paid, the amount of the difference shall be refunded by the clerk to the party paying it. If the actual cost and clerk's fee shall exceed the estimate, the amount of the excess shall be paid to the clerk before the delivery of a printed copy to either party or his counsel.

7. In case of reversal, affirmance, or dismissal, with costs, the amount of the cost of printing the record and of the clerk's fee shall be taxed against the party against whom costs are given, and shall be inserted in the body of the mandate or other proper process.

8. Upon the clerk's producing satisfactory evidence, by affidavit or the acknowledgment of the parties or their sureties, of having served a copy of the bill of fees due by them, respectively, in this court, on such parties or their sureties, an attachment shall issue against such parties or sureties, respectively, to compel payment of said fees.

9. The plaintiff in error or appellant may, within ninety days after filing the record in this court, file with the clerk a statement of the errors on which he intends to rely, and of the parts of the record which he thinks necessary for the consideration thereof, with proof of service of the same on the adverse party. The adverse party, within ninety days thereafter, may designate in writing, filed with the clerk, additional parts of the record which he thinks material; and, if he shall not do so, he shall be held to have consented to a hearing on the parts designated by the plaintiff in error or appellant. If parts of the record shall be so designated by one or both of the parties, the clerk shall

Clerk to furnish one copy to counsel of each party.

Refund or payment of extra cost of printing.

Costs, including cost of printing record, taxed and included in mandate.

Attachment may issue for clerk's costs.

Counsel may designate the parts of the record on which hearing to be had, when such parts only will be printed.—Designation to be within 90 days after filing record.—Clerk's fees computed on record as filed.

print those parts only; and the court will consider nothing but those parts of the record, and the errors so stated. If at the hearing it shall appear that any material part of the record has not been printed, the writ of error or appeal may be dismissed, or such other order made as the circumstances may appear to the court to require. If the defendant in error or appellee shall have caused unnecessary parts of the record to be printed, such order as to costs may be made as the court shall think proper.

The fees of the clerk under Rule 24, sec. 7, shall be computed, as at present, on the folios in the record as filed, and shall be in full for the performance of his duties in the execution hereof.

See Rule 24.

Clause 1 adopted February Term, 1808; published as Rule 20, 1 *Wheat.* xvii and 1 *Pet.* viii and as Clause 1 of Rule 21 in 1 *How.* xxvii. Became Clause 1 of Rule 31, promulgated January Term, 1831, Mr. Justice Baldwin dissenting at length. See 5 *Pet.* 724 *et seq.* Became Clause 1 of Rule 10 in the revision of 1858, 21 *How.* viii; amended May 8, 1876, 91 *U. S.* vii; published in 108 *U. S.* 578. Amended October Term, 1911.

Clause 2 adopted Jan. 7, 1884, 108 *U. S.* 579. Formerly the cost of printing the record was paid by the Government. See Clause 2 of Rule 37 of rules as they existed from 1790 to 1852, *ante*, page 13. See former Rule 10, page 29.

Clauses 3, 4, 5, and 6. The reasons moving the court to adopt these clauses are given by Mr. Chief Justice Waite at the October Term, 1882, 108 *U. S.* 1-4, where the former practice is stated. Clause 6 amended May 8, 1876, 93 *U. S.* vii.

Clauses 3, 4, 5 and 7 appear as Clauses 2, 3, 4, 5, and 6 of Rule 10 in the revision of 1858, 21 *How.* ix. Clause 2 amended Nov. 1, 1875, 91 *U. S.* vii. Clause 4 amended Nov. 27, 1876, 93 *U. S.* vii. Clause 6 adopted Jan. 7, 1884; published in 108 *U. S.* 579.

Clause 8 adopted as Clause 2 of an unnumbered rule, February Term, 1808, 4 *Cranch*, 527; published 1 *Wheat.* xvii and xviii and 1 *Pet.* viii; also as Clause 2 of Rule 21 in 1 *How.* xxvii. Became Clause 7 of Rule 10 in the revision of 1858, 2 *How.* ix; published as above 108 *U. S.* 579.

Clause 9 promulgated Mar. 28, 1887, 120 *U. S.* 785, 30 L. ed. 1257.

Promulgated December 22, 1911. 222 *U. S.*

NOTE. Before a case can be docketed, the clerk must receive the transcript of the record, a deposit of \$25.00 on account of costs, and an order for the entry of appearance for plaintiff in error or appellant, as the case may be, signed by counsel, a member of the bar of the Supreme Court. The balance of the estimated costs in a case must be deposited when the record is reached in order for printing, usually several months after the case is docketed.

Decisions

Every appellant to entitle him to be heard must appear as an actor in his own behalf by having appearance of counsel entered and giving the security required by Rule 10, even though his adversary has docketed the case. *The S. S. Osborne*, 105 *U. S.* 451, 26 L. ed. 1066, Oct. T., 1881.

Held: the clerk might refuse to docket a cause if the undertaking required by the rule was not filed. *Owings v. Tiernan*, 10 *Pet.* 447-448, 9 L. ed. 490, Jan. T., 1836.

Though counsel for both parties unite in the request, a cause will not be docketed *nunc pro tunc* where failure to docket arises from non-compliance with Clause 1 of Rule 10. *Van Rensselaer v. Watts*, 7 *How.* 784-785, 12 L. ed. 913, Jan. T., 1849.

The practice prior to October Term, 1876, was for the clerk to charge each party one-half the fees of the manuscript copy furnished the printer. *Osborn v. United States*, 23 L. ed. 872.

Clause 7, then the 4th Clause of Rule 10, amended to read, "In each case fees shall be charged in the taxable costs for but one manuscript copy of the record, and that shall be to the party bringing the cause into court, unless the court shall otherwise direct."¹

Each party pays the clerk his fees for services in his behalf, in theory, as the service is rendered. If afterwards costs are adjudged to him, he recovers from his adversary what he has thus paid, or is liable for if not paid. *Ib.*

Where the judgment rendered on appeal is silent as to costs neither party recovers costs, but must pay whatever is properly chargeable to him according to law and the practice. *Ib.*

NOTE. This case appears only in the Lawyers' Edition.

Under Clause 1 of Rule 10 before revision at Oct. Term, 1911, the practice had been to deposit the sum of \$25.00 in lieu of a fee bond, and subsequently to advance the costs of printing the record and the fee for its preparation.

The clerk's fee for printing the record is to be paid in the first instance by the party who prosecutes the cause. If he fails to make the payment in time to enable the clerk to print the record within the time required in the due prosecution of the cause, the writ of error will be dismissed unless sufficient excuse be shown. *Steever v. Rickeman*, 109 *U. S.* 74, 27 L. ed. 861, Oct. T., 1883.

Fees of the clerk should be paid in advance. *Ib.* 74.

Where the appellants themselves furnished the printed copies of the record the court allowed the cause to be docketed, but, as the clerk is responsible for the correctness of the record, required the clerk's fee to be paid. If the clerk performs any part of the service prescribed and named in the table of fees (Clause 7, Rule 24), he is entitled to collect the whole fee. *Bean v. Patterson*, 110 *U. S.* 401-402, 28 L. ed. 191, Oct. T., 1883.

¹ Promulgated Nov. 27, 1876.

The fee for docketing a case and filing and endorsing the transcript of the record is fixed by Rule 24 at \$5.00, and the \$25.00 above referred to covered that sum and the estimated costs up to the time for printing. *Green v. Elbert*, 137 *U. S.* 615-627, 34 L. ed. 795, Oct. T., 1890.

A member of the bar is bound to know the rules and that security should be given or a deposit made with the clerk as a condition precedent to the filing and docketing of the case. *Ib.* 623.

In this case the transcript reached the clerk before the adjournment of the term to which the writ of error was returnable, but was not then filed nor the cause docketed because the security required by Clause 1, Rule 10, was not furnished. The record was not filed until after the adjournment of the term, and was dismissed under Clause 1 of Rule 9, on motion.

The appellee cannot use the record filed by appellant to have the cause docketed and dismissed for failure to secure the clerk's fee. The certificate required by Clause 1 of Rule 9 must be produced. *West v. Brashear*, 12 *Pet.* 101, 9 L. ed. 1016, Jan. T., 1838.

Each party is liable to the clerk for his fees for services performed for such party to be enforced by attachment. *Caldwell v. Jackson*, 7 *Cranch*, 276-277, 3 L. ed. 342, Feb. T., 1812.

Prior to the amendment of Rule 10 by Clause 7, the expense of printing the record was no part of the costs of suit to be taxed. *Ib.* 277.

Because of the practice of sending the original record to the printer and taxing in the bill of costs a fee for one manuscript copy when no copy was in fact made, to reduce the expense of litigants without doing injustice to the clerk, the second clause of Rule 1 and Clauses 3, 4, 5 and 6 of Rule 10, as they now are, were adopted. *Matter of Amendments to Rules 1 and 10*, 108 *U. S.* 1-4, 27 L. ed. 630, Oct. T., 1882.

Where a cause is docketed and dismissed under Rule 9 because of failure of appellant to furnish the undertaking required by Clause 1 of Rule 10, the order of dismissal will not be set aside and leave given to docket the cause at a subsequent term. *Selma Ry. Co. v. La. N. Bk.*, 94 *U. S.* 253-255, 24 L. ed. 33, Oct. T., 1876.

Where the failure to furnish the bond required by the rule arises from an oversight, and there has been no motion to docket and dismiss a cause in which the transcript has been filed in time, leave will be given to docket the cause after the term.

After a cause has been docketed and dismissed it cannot again be docketed unless by order of the court. *Edwards v. United States*, 102 *U. S.* 575-576, 26 L. ed. 293, Oct. T., 1879.

The rule that a writ of error or appeal becomes inoperative if the transcript is not filed and the case docketed during the term to which

it is made returnable, is applicable only to cases where a return has not been made and the transcript has not been filed within the time. *Ib.* 576.

Where the transcript was received within the time prescribed by the rules, but not filed and the case docketed because of failure to comply with Clause 1 of Rule 10, but the case was thereafter docketed upon compliance with the rule; *Held*, there having been no motion to dismiss until after the cause was docketed and entry of appearance of counsel for appellant, the court would retain the cause for review. *Richardson v. Green*, 130 *U. S.* 104, 32 *L. ed.* 875.

The Act of July 22, 1892, 27 *Stat. L.* 252, ch. 209, allowing prosecution of suits *in forma pauperis* has no application to suits in the Supreme Court. *Gallaway v. State Natl. Bank*, 186 *U. S.* 177, 46 *L. ed.* 1111.

RULE XI—*Translations*

Whenever any record transmitted to this court upon a writ of error or appeal shall contain any document, paper, testimony, or other proceedings in a foreign language, and the record does not also contain a translation of such document, paper, testimony, or other proceedings, made under the authority of the inferior court, or admitted to be correct, the record shall not be printed; but the case shall be reported to this court by the clerk, and the court will order that a translation be supplied and inserted in the record.

Translations to be sent up or cause will be remanded for insertion in the record.

Promulgated December Term, 1851, as original Rule 60, 12 *How.* xi; revised and made Rule 11, December Term, 1858, 21 *How.* ix, 108 *U. S.* 580. Promulgated December 22, 1911. 222 *U. S.*

RULE XII—*Further Proof*

1. In all cases where further proof is ordered by the court, the depositions which may be taken shall be by a commission, to be issued from this court, or from any district court of the United States.

Further proof, when ordered to be by commission.

2. In all cases of admiralty and maritime jurisdiction, where new evidence shall be admissible in this court, the evidence by testimony of witnesses shall be taken under a commission to be issued from this court, or from any district

court of the United States, under the direction of any judge ^{In admiralty causes, thereof; and no such commission shall} ~~commission will issue~~ ^{only on interrogatories.} issue but upon interrogatories, to be filed by the party applying for the commission, and notice to the opposite party or his agent or attorney, accompanied with a copy of the interrogatories so filed, to file cross-interrogatories within twenty days from the service of such notice: Provided, however, That nothing in this rule shall prevent any party from giving oral testimony in open court in cases where by law it is admissible.

Clause 1 adopted February Term, 1816, as Rule 25, 1 *Wheat.* xix; 1 *How.* xxviii; published as Rule 24 in 1 *Pet.* ix, and as Clause 1 of Rule 12 in 21 *How.* ix, and 108 *U. S.* 580.

See Rule 9 of the rules as they existed from 1790 to 1852, *ante*, page 3.

Clause 2 promulgated at February Term, 1817, 2 *Wheat.* vii, viii; published as Rule 26 in 1 *Pet.* ix, and as Clause 2 of Rule 12 in 21 *How.* x, and 108 *U. S.* 580.

Promulgated December 22, 1911. 222 *U. S.*

Decisions

Cases in equity are heard upon the proof sent up with the record from the court below. No new evidence can be received. *Blease v. Darlington*, 92 *U. S.* 1-4, 23 L. ed. 522, Oct. T., 1875.

In an equity case evidence can be looked into in the Supreme Court that was not before the trial court, and the evidence certified with the record must there be considered as the only evidence before the court below. *Holmes v. Trout*, 7 *Pet.* 171-210, 8 L. ed. 661, Jan. T., 1833.

In a chancery cause, upon motion made after decree rendered on appeal, to set aside the decree and remand the case to the trial court for further preparation and proof, on the ground that new and material evidence had been discovered since the case was decided in the trial court; *Held*, the court must affirm or reverse the case as it appears in the record, and cannot receive affidavits of newly discovered evidence nor look out of the record for testimony, nor consider any paper not before the court below, and this by the established chancery practice, as also by the express prohibition of the Act of March 3, 1803 (sec. 698, *Rev. Stats.*, *U. S. Comp. Stats.* 1901, p. 568). *Russell v. Southerd*, 12 *How.* 139-159, 13 L. ed. 935.

Where an original paper not referred to in the pleadings or used in the trial, was sent up by the court below on the suggestion of one of the parties and counsel of the opposite party agreed to consider it as returned on certiorari, it was taken into consideration by the Supreme Court, though the court announced that it was not admissible by the

rules of appellate courts, which can act on no evidence that was not before the court below, nor receive any paper that was not used at the hearing. *Boone v. Chiles*, 10 *Pet.* 177-208, 9 L. ed. 399, Jan. T., 1836.

The court has power to consult public documents even if not made formal proof in the case. *United States v. Teschmaker*, 22 *How.* 392-405, 16 L. ed. 357, Dec. T., 1859.

The court is authorized to consult the records of the Government Departments. *The Paquette Habana*, 175 *U. S.* 677-696, 44 L. ed. 327, Oct. T., 1899.

Where a judge of the court below in examining the evidence discovered what he deemed a fatal variance by the date in the watermark of an original Spanish document upon which title depended and appellants in the Supreme Court asked for the issuance of a commission to procure testimony to account for the watermark or to permit them to read *ex parte* evidence to explain it, the court announced that no new evidence could be taken or received without violating established rules. *Mitchell v. United States*, 9 *Pet.* 711-731, 9 L. ed. 290, Jan. T., 1835.

In an admiralty cause upon affidavits filed that witnesses in the court below had been corrupted, a commission issued to take further testimony in support of and against the affidavits, upon interrogatories filed, with notice to the opposite party and leave to file cross-interrogatories. *Western Metropolis v. Low*, 12 *Wall.* 389, 20 L. ed. 394, Dec. T., 1870.

A commission to take testimony under Rule 12 is not allowed as of course. Some ground satisfactory to the court must be shown for failure to examine the witnesses in the court below. *The Mabey*, 13 *Wall.* 738, 20 L. ed. 473.

Further proof to be taken in the Supreme Court must be taken under a commission. *The London Packet*, 2 *Wheat.* 372-373, 4 L. ed. 264, Feb. T., 1817.

In a case of original jurisdiction between two States the court refused to appoint officers of the court to make examinations, but directed that commissions issue by the clerk in the usual form to take testimony upon interrogatories after notice to the opposite party and leave to file cross-interrogatories. The commissioners to be named by the chief justice or an associate justice if not agreed upon. The clerk was ordered to open the commissions when returned and cause the evidence to be printed for the use of the parties. Exceptions to the testimony allowed to be taken at the final hearing. *Florida v. Georgia*, 17 *How.* 478-525, 15 L. ed. 203, Dec. T., 1854.

In cases of original jurisdiction in equity the proof will be taken before a commissioner. Directions for taking the proof should be embodied in the order of appointment. *Pennsylvania v. Bridge Co.*, 9 *How.* 647-657, 13 L. ed. 298, Jan. T., 1850.

RULE XIII—*Objections to Evidence in the Record*

In all cases of equity or admiralty jurisdiction, heard in this court, no objection shall hereafter be allowed to be taken to the admissibility of any deposition, deed, grant, or other exhibit found in the record as evidence, unless objection was taken thereto in the court below and entered of record; but the same shall otherwise be deemed to have been admitted by consent.

In equity and admiralty causes objections to evidence not entered of record in court below not considered.

Promulgated February Term, 1824, as Clause 2 of an unnumbered rule, 9 *Wheat.* iv; published as Rule 32 in 1 *Pet.* x; made Rule 13 in the revision at the December Term, 1858, 21 *How.* x; 108 *U. S.* 580.

Promulgated December 22, 1911. 222 *U. S.*

Decisions

The Supreme Court will not listen to an objection that a deposition was taken after the cause was set down and without any order of the court, where no objection appears to have been made in the court below. *Bank v. Seton*, 1 *Pet.* 299-307, 7 L. ed. 156, Jan. T., 1828.

Where the defendant cross-examines a witness whose deposition is irregularly taken, it is a waiver of the irregularity. *Ib.* 307.

Although objection is made in the appellate court that there is a fatal variance between the facts found and the case made by the plaintiff, where none of the evidence is objected to in the court below and no exception taken to the court's announced findings, or subsequently when judgment was entered, objections cannot be presented for the first time in the Supreme Court. *Railway Co. v. Lindsay*, 4 *Wall.* 650-656, 18 L. ed. 330, Dec. T., 1866.

No point arising on the pleadings or evidence in an appellate court may be made which was not brought to the notice of the inferior court. Where an issue at law was directed by a court of chancery, and upon the trial exceptions were taken to the rulings of the court but these objections to the verdict were not brought before the judges sitting as a court of chancery because the same judges sat in the court of law, *Held*, the exceptions could not be insisted upon in the Supreme Court. *Brockett v. Brockett*, 3 *How.* 691-692, 11 L. ed. 787, Jan. T., 1845.

The findings of a master to which no exceptions were filed, is as

conclusive in the appellate court as in the court below. *Canal Co. v. Gordon*, 6 *Wall.* 561-569, 18 L. ed. 895, Dec. T., 1867.

Where a referee finds facts inferentially and not directly, the defect in form of the report should be called to the attention of the court below for a more definite finding. It cannot be considered in the appellate court for the first time. *Lumber Co. v. Butchel*, 101 *U. S.* 633-637, 25 L. ed. 1073, Oct. T., 1879.

Evidence which has been admitted without any objection and forms part of the record cannot be disregarded because the subject-matter of that evidence was not averred in the pleadings. Where it is found in the record, without objection taken in the court below, the appellate court should examine and give effect to all the evidence in the record. Dissenting opinion of Mr. Justice Baldwin in *Harrison v. Nixon*, 9 *Pet.* 483-537, 9 L. ed. 221, Jan. T., 1835.

In a suit at law, *held* in examining the admissibility of evidence a party will be confined, as a general rule, to the specific objection taken to it in the court below. *Hinde v. Longworth*, 11 *Wheat.* 199-209, 6 L. ed. 456, Feb. T., 1826.

Where in a trial of a suit at law the objection to the admission of a deed is that it bears upon its face evidence of fraud but pointing out no specific vice, the objection is too vague to sustain inquiry into the action of the court below. *Thomas v. Lawson*, 21 *How.* 331-338, 16 L. ed. 84, Dec. T., 1858.

If error is predicated upon any ruling of the lower court, that ruling should affirmatively and distinctly appear. *San Pedro, etc., Co. v. United States*, 146 *U. S.* 120-136, 38 L. ed. 916, Oct. T., 1892.

Where the trial is by the court without a jury, a stipulation of counsel as to the evidence bearing on a finding, will not be noticed. *Ft. Worth C. Co. v. Smith Bridge Co.*, 151 *U. S.* 294-300, 38 L. ed. 169, Oct. T., 1893.

Where a deposition is not made a part of and is not in the record, the appellate court cannot consider whether its exclusion is prejudicial. *Whitney v. Fox*, 166 *U. S.* 637-645, 41 L. ed. 1148, Oct. T., 1896.

RULE XIV—*Certiorari*

No certiorari for diminution of the record will be hereafter awarded in any case, unless a motion therefor shall be made in writing, and the facts on which the same is founded shall, if not admitted by the other party, be verified by affidavit. And all motions for certiorari must be made at the first term of the entry of the case; otherwise, the

Motions for certiorari for diminution of the record must be at the first term and in writing, verified, setting out the facts.

same will not be granted, unless upon special cause shown to the court, accounting satisfactorily for the delay.

Promulgated January Term, 1824, as Clause 1 of a rule without number, 9 *Wheat.* iv; published as Rule 31, 1 *Pet.* x; made Rule 14 in the revision at the December Term, 1858, 21 *How.* x; 108 *U. S.* 581.

Promulgated December 22, 1911. 222 *U. S.*

Decisions

A motion for certiorari for diminution of the record will be denied when not made at the first term, and no satisfactory excuse for the delay is shown. *Chappell v. United States*, 160 *U. S.* 499-506, 40 L. ed. 512.

Where the transcript is imperfect by the omission of a paper material to a decision, which was used in the court below, and the defendant in error is not represented by counsel, the court of its own motion may direct a certiorari to issue to supply the omission. *Morgan v. Curtenius*, 19 *How.* 8, 15 L. ed. 576, Dec. T., 1856.

Where the point was made in the defendant's brief that no judgment was in the record, but no motion to dismiss the writ of error before the hearing had been made, the court inspected the record and, no judgment being found, of its own motion gave the plaintiffs time to perfect the record by certiorari. *Sweeney v. Lomme*, 22 *Wall.* 208-215, 22 L. ed. 729, Oct. T., 1874.

Where the certificate to the transcript is made as authorized, but the record is incomplete, the dissatisfied party should ask for a certiorari, which is readily granted when applied for in season. *United States v. Gomez*, 1 *Wall.* 690-702, 17 L. ed. 680, Dec. T., 1863.

Where the clerk certifies the transcript to be a full and perfect copy of the proceedings, if the certificate is not true, the remedy is by certiorari to supply the deficiencies. *Missouri, K. & T. Ry. Co. v. Dinsmore*, 108 *U. S.* 30-31, 27 L. ed. 640, Oct. T., 1882.

Though an equity case was disposed of on demurrer, in the court below, and the evidence on file was not necessary for hearing the appeal, where the record had not been printed in full, and the parties disagreed as to what it contained, certiorari to bring up the evidence was allowed. *Ib.* 31.

For a certiorari to issue it must appear from the record that the evidence was used or offered in the court below. *Holmes v. Trout*, 7 *Pet.* 171-210, 8 L. ed. 661, Jan. T., 1833.

Where a bill of exceptions states that judgment was entered yet the record does not contain the judgment itself, the plaintiff in error

may apply for a certiorari to bring up a perfect record, or dismiss and proceed anew. *Elmore v. Grimes*, 1 *Pet.* 469-472, 7 L. ed. 226, Jan. T., 1828.

Where the clerk had made an error in not entering the judgment according to the declaration upon application for a certiorari to amend the record, the amendment was allowed in the Supreme Court in a cause brought up to a previous term. *Woodward v. Brown*, 13 *Pet.* 1-2, 10 L. ed. 31, Jan. T., 1839.

A certiorari is not the proper remedy for the failure of the clerk to append to the transcript his certificate that it contains the full record. The transcript may be permitted to be withdrawn to enable the clerk to supply the necessary certificate. *Hodges v. Vaughan*, 19 *Wall.* 12-13, 22 L. ed. 46, Oct. T., 1873.

If the record as certified is incorrect, errors or omissions must be suggested and a certiorari moved for (at the first term). No evidence *dehors* the record can be received to impeach the record. This on a motion to dismiss as well as on hearing. *Hudgins v. Kemp*, 18 *How.* 530, 15 L. ed. 512.

Clerical errors in the record may be amended, and other amendments may be made by consent. Clerical errors should be corrected by the clerk's certificate. *Ib.*

The record as it stands when the motion is heard, or cause heard, presents the case the court is called on to decide; nothing outside of it can be introduced to affect the decision. *Ib.*

Certiorari is not the proper mode of completing the findings, being the conclusions deduced from the evidence upon which a decree of the Court of Claims is founded. That court on motion, duly made, may be required by order to make return as to such facts. *United States v. Adams*, 9 *Wall.* 661-663, 19 L. ed. 808, Dec. T., 1869.

A certiorari will be awarded upon the suggestion that a citation has been served but not transmitted with the record. *Field v. Milton*, 3 *Cranch*, 514, 2 L. ed. 516, Feb. T., 1806.

Certiorari will not be awarded to a Circuit (District) Court to certify special findings of fact required by the Act of Feb. 16, 1875, where omission to make such findings is attributable to the fault of the parties and not to the court. *The S. S. Osborne*, 104 *U. S.* 183-184, 26 L. ed. 603, Oct. T., 1881.

The court will award a certiorari on suggestion of diminution even at the third term after the appeal is filed and docketed if the delay be accounted for, but the hearing will not be postponed. *Clark v.*

Hackett, 1 *Black.* 77-78, Dec. T., 1861. See *Been v. Heath*, 35 L. ed. 1174, unreported practice cases.

After a judgment has been rendered by the Supreme Court it is too late to say that the statement of facts contained in the bill of exceptions is erroneous, and to seek to amend the bill of exceptions by certiorari, on the ground that material evidence has been omitted.

Any error or mistake resulting from the adoption by the court of a bill of exceptions presented by the opposite party, may be corrected by certiorari if the application is made in due time. *Gayler v. Wilder*, 10 *How.* 509-510, 13 L. ed. 518, Dec. T., 1850.

In no case can an exception taken as certified by the judge of the court below be altered or amended, but if by a clerical error there is an omission of a part of a charge which was in fact embraced in the exception, upon producing a copy of the exception properly certified, the plaintiff in error will be entitled to a certiorari to supply the defect. *Stimpson v. Railroad Co.*, 3 *How.* 553-556, 11 L. ed. 724, Jan. T., 1845.

Upon a writ of error on a judgment on a forthcoming bond where the original judgment had been reversed in the Supreme Court, as the proceedings in the original suit formed no part of the subsequent suit, the court framed a special writ of certiorari to bring up the execution recited in the bond. *Barton v. Petit and Bayard*, 7 *Cranch*, 288-290, 3 L. ed. 348, Feb. T., 1813.

Where the judgment of an inferior State court is final to which the writ of error is directed, a certiorari does not lie to bring up the rulings of the Supreme Court of the State on exceptions certified to it in the same cause. *McGuire v. The Commonwealth*, 3 *Wall.* 382-386, 18 L. ed. 165, Dec. T., 1865.

Where a certiorari is granted the court will not take any action on the merits until a return of the writ. *Ex parte Dugan*, 2 *Wall.* 134, 17 L. ed. 871, Dec. T., 1864.

The return is properly made by the clerk of the court below. *Stewart v. Ingle*, 9 *Wheat.* 526, 6 L. ed. 151, Feb. T., 1824.

Where the record sent up from the District Court fails to disclose that the cause has been passed upon by the Circuit Court of Appeals, but the Supreme Court is apprised that the action of the District Court is in accordance with a mandate of the appellate court the Supreme Court will direct the court below to supply the deficiency, if any, in the record by certifying all the proceedings had in the case. *Union Trust Co. v. Westhus*, 228 *U. S.* 519-521.

The writ of certiorari cannot be used to bring up a new record of new proceedings had since the final judgment in the court below. *United States v. Young*, 94 *U. S.* 258-259, 24 L. ed. 153, Oct. T., 1876.

It is (was) employed in the Supreme Court only as an auxiliary process to enable the court to obtain further information in respect to some matter already before it for adjudication. *Ib.* 260.

The certiorari mentioned in sec. 6 of the Act of Mar. 3, 1891, is the equivalent to an appeal or writ of error, and is issued at the discretion of the Supreme Court. The auxiliary writ of certiorari to perfect the record does not operate to bring up for review a case, or add any force to an appeal. *Huguley Mfg. Co. v. Galetton Mills*, 184 U. S. 290-296, 46 L. ed. 549, Oct. T., 1901.

RULE XV—*Death of a Party*

1. Whenever, pending a writ of error or appeal in this court, either party shall die, the proper representatives in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the suit, and thereupon the case shall be heard and determined as in other cases;

In suits abated by death, legal representative may be made party.—The other party may require revival of the suit or its dismissal.

and if such representatives shall not voluntarily become parties, then the other party may suggest the death on the record, and thereupon, on motion, obtain an order that unless such representatives shall become parties within the first ten days of the ensuing term, the party moving for such order, if defendant in error or appellee, shall be entitled to have the writ of error or appeal dismissed; and if the party so moving shall be plaintiff in error or appellant he shall be entitled to open the record, and on hearing have the judgment or decree reversed, if it be erroneous: Provided, however, That a copy of every such order shall be printed in some newspaper of general circulation within the State, Territory, or District from which the case is brought, for three successive weeks, at least sixty days before the beginning of the term of the Supreme Court then next ensuing.

2. When the death of a party is suggested, and the representatives of the deceased do not appear by the tenth day of the second term next succeeding the suggestion, and no measures are taken by the opposite party within that time to compel their appearance, the case shall abate.

Without action by either party, after suggestion of death, case abates by the tenth day of next term.

3. When either party to a suit in a court of the United States shall desire to prosecute a writ of error or appeal to the Supreme Court of the United States, from any final judgment or decree, rendered in such court, and at the time of

Proceedings, when suit has abated in court below, after judgment or decree, and no representative of deceased resides in the same State. suing out such writ of error or appeal the other party to the suit shall be dead and have no proper representative within the jurisdiction of the court which rendered such final judgment or decree, so that the suit cannot be revived in that court, but shall have a proper representative in some State or Territory of the United States, the party desiring such writ of error or appeal may procure the same, and may have proceedings on such judgment or decree superseded or stayed in the same manner as is now allowed by law in other cases, and shall thereupon proceed with such writ of error or appeal as in other cases. And within thirty days after the commencement of the term to which such writ of error or appeal is returnable, the plaintiff in error or appellant shall make a suggestion to the court, supported by affidavit, that the said party was dead when the writ of error or appeal was taken or sued out, and had no proper representative within the jurisdiction of the court which rendered said judgment or decree, so that the suit could not be revived in that court, and that said party had a proper representative in some State or Territory of the United States, and stating therein the name and character of such representative, and the State or Territory in which such representative resides; and, upon such suggestion, he may, on motion, obtain an order that, unless such representative shall make himself a party within the first ten days of the ensuing term of the court, the plaintiff in error or appellant shall be entitled to open the record, and, on hearing, have the judgment or decree reversed, if the same be erroneous: Provided, however, That a proper citation reciting the substance of such order shall be served upon such representative, either personally or by being left at his residence, at least sixty days before the beginning of the term of the Supreme Court then next ensuing: And provided, also, That in every such case if the representative of the deceased party does not appear by the tenth day of the

term next succeeding said suggestion, and the measures above provided to compel the appearance of such representative have not been taken within time as above required, by the opposite party, the case shall abate: And provided, also, That the said representative may at any time before or after said suggestion come in and be made a party to the suit, and thereupon the case shall proceed, and be heard and determined as in other cases.

Clause 1 adopted as Rule 31 at the February Term, 1831, 6 *Wheat.* v, vi; published as Rule 28, 1 *Pet.* ix. Became Clause 1 of Rule 15 in the revision of 1859, 21 *How.* x; amended Dec. 11, 1879, 100 *U. S.* ix; revised Jan. 7, 1884, 108 *U. S.* 581.

Clause 2 adopted as Rule 61 at December Term, 1851, 13 *How.* v. In the revision of 1858 became Clause 2 of Rule 15, 21 *How.* xi; 108 *U. S.* 582.

Clause 3 promulgated Jan. 12, 1875, 20 *Wall.* xv; published 108 *U. S.* 582, amended Oct. Term, 1911.

Promulgated December 22, 1911. 222 *U. S.*

Decisions

Where after the writ is issued, one of three parties, plaintiffs in a writ of error, dies, it is not necessary to make his heirs and representatives parties to the writ as the cause of action survives to the other plaintiffs in error. *McKinney v. Carroll*, 12 *Pet.* 66-71, 9 L. ed. 1004, Jan. T., 1838.

When a party dies while a cause is under advisement, judgment may be entered *nunc pro tunc* as of the first day of the term. *Clay v. Smith*, 3 *Pet.* 411-412, 7 L. ed. 724, Jan. T., 1830.

Where one of two co-defendants dies after the commencement of the term the judgment may be entered against both defendants on a day prior, *nunc pro tunc*, but if death occurs before the commencement, then upon suggestion of the death being entered of record the cause of action surviving, the judgment may be entered against the surviving defendant. *McNutt v. Bland*, 2 *How.* 9-28, 11 L. ed. 166, Jan. T., 1844.

Where an opinion of the court had been delivered in favor of the appellants and objection was made to the entry of a decree against the defendant, who had died since the commencement of the term, the court ordered the decree to be entered as of the first day of the term. *Bank v. Weisiger*, 2 *Pet.* 481, 7 L. ed. 492, Jan. T., 1829.

Where one of the parties has died since the submission of the cause a decree of reversal for further proceedings will be made *nunc pro tunc* as of the date the cause was submitted. *Louisville & Nashville R. Co. v. Behlmer*, 175 *U. S.* 648-676, 44 L. ed. 320, Oct. T., 1899.

Where the death of a party was suggested at the December Term, 1851, and his legal representatives did not appear by Dec. 10, 1854, the cause was held to have abated under Rule 61, now Rule 15. *Barribeau v. Brant*, 17 *How.* 43-46, 15 L. ed. 35, Dec. T., 1854.

The only persons who can be permitted to appear in his stead upon the death of a party, are those who succeed to the interest he then had. An assignee under title acquired prior to the writ of error or appeal cannot thus appear. *Ib.* 46.

Where an appellee dies after an appeal is taken, the administrator appointed in the jurisdiction of the decedent's domicil is properly admitted as the appellee to defend the appeal, though appointed in a State other than that wherein the decree was obtained. *Noonan v. Bradley*, 12 *Wall.* 121-128, 20 L. ed. 281, Dec. T., 1870.

Where the jurisdiction of the court is acquired by the diverse citizenship of the original parties, it is not divested by the death of a party and the substitution of his administrator who lacks the necessary diverse citizenship. *Clarke v. Mathewson*, 12 *Pet.* 164-171, 9 L. ed. 1044, Jan. T., 1838.

One who has conducted a cause in the name of another with his consent may, after his death, use the names of such other's legal representatives to prosecute an appeal or writ of error. *Kellogg v. Forsyth*, 24 *How.* 186-187, 16 L. ed. 655, Dec. T., 1860.

Where the defendant pleaded that the plaintiff had assigned the cause of action before suit, upon death of the plaintiff after judgment and before writ of error sued out, the writ of error taken in the name of such deceased plaintiff, for the use of the assignee of the cause of action as the complaint had been amended to allege, *Held*, to be sufficiently regular to defeat a motion to dismiss. *Amadeo v. Northern Assur. Co.*, 201 *U. S.* 194-201, 50 L. ed. 726, Oct. T., 1905.

Where pending a writ of error to the Supreme Court, subsequently dismissed, the defendant in error dies, if the plaintiff in error takes out a new writ in the name of the deceased, the practice is irregular. Application should be made to the court below to revive the suit in the name of the deceased's legal representatives, and then the writ of error can be regularly issued. If the court refuses this application, the writ may be issued in the name of the representatives of the deceased and citation served on them. *McClaine v. Boone*, 6 *Wall.* 244-245, 18 L. ed. 836, Dec. T., 1867.

In real actions upon death of the ancestor without having appeared where new parties are made by order of the court as representatives

of a deceased party, and judgment is rendered against them though by default, they are entitled to sue out a writ of error. *Macker v. Thomas*, 7 *Wheat.* 530-532, 5 L. ed. 515, Feb. T., 1822.

Before he shall be permitted to prosecute (or defend) the executor must show himself to be executor unless the fact be admitted by the parties, and he may be required to produce his letters testamentary; but if the order for his admission as a party be made, it is too late to contest the fact of his being an executor. *Wilson v. Codman's Executor*, 3 *Cranch*, 193-207, 2 L. ed. 413, Feb. T., 1805.

If the court unguardedly permits a person to prosecute who has not given satisfactory evidence of his right to do so, it possesses and will employ means of preventing any mischief from its inadvertence. *Ib.* 207.

Where the judgment in the court below in an action for personal injuries is against the plaintiff, who dies after the writ of error is sued out, the writ will be dismissed. *Gerling v. B. & O. R. R. Co.*, 150 *U. S.* 673-703, 38 L. ed. 322, Oct. T., 1893.

In no case does a writ of error in personal actions abate by the death of the defendant in error. *Green v. Watkins*, 6 *Wheat.* 260-262, 5 L. ed. 256, Feb. T., 1821.

Proceedings in admiralty are *in rem*, therefore the death of one of the parties to a decree does not abate the suit. *Penhallow v. Doane*, 3 *Dall.* 54-86, 1 L. ed. 521, Feb. T., 1795.

Suggestion of the death of plaintiff in error made by his counsel at December Term, 1846, and leave given to make his representatives parties, which not being done, the writ of error held to be abated and the cause remanded to "be proceeded in according to law and justice." *Phillips v. Preston*, 11 *How.* 294, 13 L. ed. 702, Dec. T., 1850.

In a cause of magnitude the court will, in its discretion, grant a continuance on account of the death of counsel. *Hunter v. Fairfax*, 3 *Dall.* 305-306, 1 L. ed. 613, Aug. T., 1796.

RULE XVI—*No Appearance of Plaintiff in Error or Appellant*

Where no counsel appears and no brief has been filed for the plaintiff in error or appellant, when the case is called for trial, the defendant in error or appellee may have the plaintiff in error or appellant called and the writ of error or appeal dismissed, or may open the record and pray for an affirmance.

Case dismissed, if when called no appearance or brief for plaintiff.

At the February Term, 1806, Mr. Chief Justice Marshall stated the practice as embodied in this rule, but owing to the omission of the clerk to enter this with the

other rules it was not published in the reports until 3 *Pet.* xvii. Published as part of Rule 19 in 1 *How.* xxvii; made Rule 16 in the revision at the December Term, 1858. 21 *How.* xi; amended Jan. 7, 1884, 108 *U. S.* 583.

Promulgated December 22, 1911. 222 *U. S.*

Decisions

The object of the rule is to embrace a class of cases where there is no appearance when the case is reached in the regular call of the docket. *Larman v. Tisdale*, 35 L. ed. 1174, unreported practice cases.

Dismissal under this rule is with costs. *Montalet v. Murray*, 3 *Cranch*, 249, 2 L. ed. 429, Feb. T., 1806.

It is not necessary to give notice of intention to enforce Rule 16, and an appeal dismissed thereunder will not be reinstated except for very good reasons. *James v. McCormick*, 105 *U. S.* 265, 26 L. ed. 1044, Oct. T., 1881.

When a cause is reached in its order and dismissed for want of appearance of appellant as required by Rule 9, Paragraph 3, it will not be reinstated over objection. *Hurley v. Jones*, 97 *U. S.* 318-319, 24 L. ed. 1009, Oct. T., 1878.

After the withdrawal of the appearance of plaintiff's counsel it is the defendant's right to have the plaintiff called and the suit dismissed or to open the record and pray an affirmance. *McGuire v. Massachusetts*, 3 *Wall.* 382-387, 18 L. ed. 165, Dec. T., 1865.

Upon a writ of error to the Supreme Court of a Territory, where there was no appearance and no assignment of error in the Supreme Court, the defendant in error moved to open the record and affirm the judgment. The court examined the record and, finding that the errors assigned in the court below were not well taken, affirmed the judgment. *Maxwell v. Stewart*, 21 *Wall.* 71-73, 22 L. ed. 565, Oct. T., 1874.

The death of the appellee having been suggested, counsel for the executor offered to appear and moved to dismiss the cause. As there was no appearance by the appellants the court directed the cause to be dismissed. *Hook v. Linton*, 10 *Pet.* 107, 9 L. ed. 363, Jan. T., 1836.

Where an assignment of error is not returned with the writ of error as required by sec. 997, *Rev. Stats.* (*U. S. Comp. Stats.* 1901, p. 712), and counsel for plaintiff in error has been permitted to withdraw his appearance, if no substitute has taken his place when the cause is reached on the call of the docket, the judgment will be affirmed without opening the record. *Boston H. G. M. Co. v. Eagle Copper S. M. Co.*, 115 *U. S.* 221, 29 L. ed. 393, Oct. T., 1885.

RULE XVII—*No Appearance of Defendant in Error or Appellee*

Where the defendant in error or appellee fails to appear when the case is called for trial, the court may proceed to hear an argument on the part of the plaintiff in error or appellant and to give judgment according to the right of the case.

Argument heard on part of plaintiff, when case called, even if defendant fails to appear.

Promulgated Dec. 9, 1801, as Rule 15, 1 *Cranch*, xviii; published in 1 *Wheat*, xvi, 1 *Pet*, vii, and 1 *How*, xxv; made Rule 17 in the revision at the December Term, 1858, 21 *How*, xi; published in 108 *U. S.* 583.

Promulgated December 22, 1911. 222 *U. S.*

Decisions

In general it is of no importance to the appellant whether the appearance of appellee is or is not entered on the record. The refusal or omission of appellee to appear will not delay the trial, and the judgment will be as conclusive as if appellee had entered his appearance and his case had been argued by counsel. *United States v. Yates*, 6 *How*, 605–608, 12 L. ed. 577, Jan. T., 1848.

An improvident appearance of appellee may be withdrawn, but such withdrawal will not authorize a motion to dismiss for want of citation, nor does such appearance cure a want of jurisdiction. *Ib.* 608.

An irregularity in the service of citation can only be taken advantage of by motion to dismiss, made promptly on an appearance limited to that special purpose, and is cured by an appearance not limited to any particular purpose though special in terms. *Renaud v. Abbott*, 116 *U. S.* 277–281, 29 L. ed. 630, Oct. T., 1885.

The appearance of counsel for the defendant in error upon a citation irregular because signed by the clerk and not by the judge, without a motion at the first term to dismiss, is a waiver of any irregularity in the citation, and is an admission of the receipt of notice to appear. *Chaffee v. Heyward*, 20 *How*, 208–209, 15 L. ed. 805, Dec. T., 1857.

Where a State is a party, the court may grant further time for appearance. *Oswald v. New York*, 2 *Dall.* 415, 1 L. ed. 438, Feb. T., 1793.

RULE XVIII—*No Appearance of Either Party*

When a case is reached in the regular call of the docket, and there is no appearance for either party, the case shall be dismissed at the cost of the plaintiff in error or appellant.

Promulgated January Term, 1850, as Rule 54, 8 *How*, v; amended and became Rule 59 at the December Term, 1851, 12 *How*, xi; made Rule 18 in the revision at

the December Term, 1858, 21 *How.* xi; amended Jan. 7, 1884; published in 108 *U. S.* 583; amended December 22, 1911. 222 *U. S.*

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The rule applied. *Radford v. Craig*, 5 *Cranch*, 289, 3 L. ed. 104, Feb. T., 1809.

The original general Rule 54, requiring an appearance to be entered on or before the second day of the term next succeeding that at which the case is docketed, applied to cases docketed at the regular term and not to an adjourned term. *Lowman v. Tisdale's Heirs*, 11 *How.* 586, 13 L. ed. 824, Dec. T., 1850.

RULE XIX—*Neither Party ready at Second Term*

When a case is called for argument at two successive terms, and upon the call at the second term Cases called at two successive terms, when dismissed. neither party is prepared to argue it, it shall be dismissed at the cost of the plaintiff in error or appellant, unless sufficient cause is shown for further postponement.

Promulgated December Term, 1849, as original Rule 55, 8 *How.* vi; made Rule 19 in the revision at the December Term, 1858, 21 *How.* xii; published in 108 *U. S.* 583; amended December 22, 1911. 222 *U. S.*

RULE XX—*Printed Arguments*

1. In all cases brought here on writ of error, appeal, or otherwise, the court will receive printed Cases may be submitted on printed briefs without argument. arguments without regard to the number of the case on the docket, if the counsel on both sides shall choose to submit the same within the first ninety days of the term; and, in addition, appeals from the Court of Claims may be submitted by both parties within thirty days after they are docketed, but not after the first day of April; but thirty copies of the arguments, signed by attorneys or counsellors of this court, must be first filed.

2. When a case is reached in the regular call of the docket, and a printed argument shall be filed for Filing a brief equivalent to appearance. one or both parties, the case shall stand on the same footing as if there were an appearance by counsel.

3. When a case is taken up for trial upon the regular call of the docket, and argued orally in behalf of only one of the parties, no printed argument for the opposite party will be received, unless it is filed before the oral argument begins, and the court will proceed to consider and decide the case upon the *ex parte* argument.

Briefs must be filed before case orally argued by the other party.

4. No brief or argument will be received, either through the clerk or otherwise, after a case has been argued or submitted, except upon leave granted in open court after notice to opposing counsel.

After argument briefs filed only by leave in open court on notice.

Clause 1 adopted at the January Term, 1833, as general Rule 40, 7 *Pet.* iv; published 1 *How.* xxxv. See Rule 49 of the rules from 1790 to 1852, *ante*, page 18, and 1 *How.* xxxviii. At the January Term, 1845, a new rule was adopted that no printed argument be received unless signed by an attorney or counsellor of the Supreme Court, and an amendment to Rule 40, allowing the filing of arguments until the first Monday in February, while the court continued to meet on the first Monday in December. Rule 49, adopted at the January Term, 1842, was rescinded, 3 *How.* vi. In the revision of December Term, 1858, became Clause 1 of Rule 20; amended Mar. 10, 1865, 2 *Wall.* viii; again amended at the December Term, 1865, 3 *Wall.* viii, and again amended at the October Term, 1874, 21 *Wall.* v; published in 108 *U. S.* 584; amended October Term, 1911.

Clause 2 adopted at the January Term, 1837, as Rule 44, 11 *Pet.* vii; 1 *How.* xxxvi. Became Clause 2 of Rule 20 in the revision of December Term, 1858, 21 *How.* xii; published in 108 *U. S.* 584.

Clause 3 promulgated as Rule 58 at the December Term, 1850, 10 *How.* v, and became Clause 3 of Rule 20 in the revision of 1859, 21 *How.* xii; published in 108 *U. S.* 584.

Clause 4 promulgated Dec. 14, 1874, 20 *Wall.* xvi; published 108 *U. S.* 584.

Promulgated December 22, 1911. 222 *U. S.*

Decisions

Parties will not be allowed to withdraw a stipulation to submit and set the cause down for oral argument, without a sufficient showing. *Wright v. Nagle*, 101 *U. S.* 791-793, 25 L. ed. 922, Oct. T., 1879.

Stipulation between counsel relative to the course of proceeding in a cause cannot be withdrawn by one party without the consent of the other, except by leave of the court upon cause shown. Application for the vacation of a stipulation to submit under Rule 20 should be made before the expiration of the time limited in the agreement. *Muller v. Downs*, 94 *U. S.* 277-278, 24 L. ed. 77, Oct. T., 1876.

When no reference is made to Rule 20, but the stipulation binds the parties to submit the cause and there is nothing which requires this to be done at any particular time, its terms are fulfilled if the submission is made when the case is reached in its order. *Glenn v. Fant*, 124 *U. S.* 123-124, 31 L. ed. 352, Oct. T., 1887.

Where counsel have submitted a case under Rule 20, if the plaintiff in error fails to file his argument within the time limited the court will take up the case as submitted. *Aurrecoechea v. Bangs*, 110 *U. S.* 217-218, 28 L. ed. 126, Oct. T., 1883.

NOTE. Plaintiff in error was afterward allowed to be heard upon payment of costs of the term and of printing the record within the time limited.

In a cause submitted under Rule 20 and dismissed *sua sponte* for failure of plaintiff in error to show a jurisdictional amount, either by the record or by affidavit, the court refused to reinstate the cause upon motion with affidavits, filed more than two years after the order of dismissal.

Where parties fail to act promptly after they have actual notice of what is required, they will not be heard. *Johnson v. Wilkins*, 118 *U. S.* 228-229, 30 L. ed. 210, Oct. T., 1885.

The court will not receive or examine a printed argument not presented in court and shown to the opposite counsel. *Mitchell v. United States*, 8 *Pet.* 307, 8 L. ed. 955, Jan. T., 1834.

Where a cause is submitted on printed argument the court usually examines the record to see whether it has jurisdiction, whether the question is raised by counsel or not. *Bartemeyer v. Iowa*, 14 *Wall.* 26, 20 L. ed. 792, Dec. T., 1871.

A brief of counsel containing impertinent and scandalous matter, unfit to be submitted to the court, will be stricken from the files. *Green v. Elbert*, 137 *U. S.* 615-624, 34 L. ed. 796, Oct. T., 1890.

RULE XXI—*Briefs*

1. The counsel for plaintiff in error or appellant shall file with the clerk of the court, at least three weeks before the case is called for argument, thirty copies of a printed brief, one of which shall, on application, be furnished to each of the counsel engaged upon the opposite side.

Thirty copies of plaintiff's brief to be filed three weeks before case called.

2. This brief shall contain, in the order here stated—

(1) A concise abstract, or statement of the case, presenting succinctly the questions involved and the manner in which they are raised.

(2) A specification of the errors relied upon, which, in cases brought up by writ of error, shall set out separately and particularly each error asserted and intended to be urged; and in cases brought

What plaintiff's brief to contain.

up by appeal the specification shall state, as particularly as may be, in what the decree is alleged to be erroneous. When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the specification shall set out the part referred to *totidem verbis*, whether it be instructions given or instructions refused. When the error alleged is to a ruling upon the report of a master, the specification shall state the exception to the report and the action of the court upon it.

(3) A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record and the authorities relied upon in support of each point. When a statute of a State is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length.

3. The counsel for a defendant in error or an appellee shall file with the clerk thirty printed copies of his argument, at least one week before the case is called for hearing. His brief shall be of like character with that required of the plaintiff in error or appellant, except that no specification of errors shall be required, and no statement of the case, unless that presented by the plaintiff in error or appellant is controverted.

Defendant to file 30 copies of brief one week before case called. — What to contain.

4. When there is no assignment of errors, as required by sec. 997 of the Revised Statutes, counsel will not be heard, except at the request of the court; and errors not specified according to this rule will be disregarded; but the court, at its option, may notice a plain error not assigned or specified.

Assignment of errors to conform to sec. 997, Rev. Stats.—Court may notice a plain error not assigned.

5. When, according to this rule, a plaintiff in error or an appellant is in default, the case may be dismissed on motion; and when a defendant in error or an appellee is in default, he will not be heard, except on consent of his adversary, and by request of the court.

Default by plaintiff cause for dismissal.— Default by defendant, he will not be heard.

6. When no oral argument is made for one of the parties, One counsel only heard, when oral argument not made for other party. only one counsel will be heard for the adverse party.

7. No brief or printed argument, required by the foregoing sections, shall be filed by the clerk unless the same shall be accompanied by satisfactory proof of service upon counsel for the adverse party.

8. Every brief of more than twenty pages shall contain More than 20 pages brief to be indexed. on its front fly leaves a subject index with page references, the subject index to be supplemented by a list of all cases referred to, alphabetically arranged, together with references to pages where the cases are cited.

Clause 1 promulgated as Rule 30 at the February Term, 1821, 6 *Wheat.* v; published as Rule 27 in 1 *Pet.* ix and as Rule 29 in 1 *How.* xxx. See general Rule 53, promulgated at the January Term, 1850, 8 *How.* v. By this rule no book or case not referred to in the printed brief was permitted to be referred to in argument. Mr. Justice Wayne dissented from the rule and Woodbury, J., did not concur. Rule 57 promulgated at the December Term, 1849, required 12 printed copies filed three days before the case was called. Became Clauses 3 and 6 of Rule 21 in the revision of 1859, 21 *How.* xii, xiii, and Clauses 3 and 11 of the revision of 1871, 11 *Wall.* ix; amended Nov. 16, 1872, 14 *Wall.* xi, and Jan. 7, 1884; published 108 *U. S.* 584; amended October Term, 1911.

NOTE. The brief must be signed by a member of the bar of the Supreme Court. The firm name is improper.

Clause 2 promulgated May 1, 1871, 11 *Wall.* ix; revised Nov. 16, 1872, 14 *Wall.* xi; revised Jan. 7, 1884, 108 *U. S.* 585.

Clause 3 published as revised in 1871 in 11 *Wall.* ix; amended Nov. 16, 1872, 14 *Wall.* xi; amended Jan. 7, 1884, 108 *U. S.* 585; amended October Term, 1911.

Clause 4 promulgated May 1, 1871, as Clauses 5, 6 and 8 of Rule 21, 11 *Wall.* ix; amended Nov. 16, 1872, 14 *Wall.* xii; published 108 *U. S.* 585.

Clause 5 adopted as Rule 53 at the December Term, 1849, promulgated January Term, 1850, 8 *How.* v. Made Clause 5 of Rule 21 in the revision of 1859, 21 *How.* xii, and Clause 10 of Rule 21 in the revision of May 1, 1871, 11 *Wall.* x, and Clause 9 of Rule 21, Nov. 16, 1872, 14 *Wall.* xii. Made Clause 5 in the revision of 1884, 108 *U. S.* 585.

Clause 6 adopted as Clause 7 of Rule 21, December Term, 1858, 21 *How.* xiii. Became Clause 12 of Rule 21 in the revision of May 1, 1871, 11 *How.* x; amended as Clause 10, Nov. 16, 1872, 14 *Wall.* xii. Made Clause 6, Jan. 7, 1884, 108 *U. S.* 585; amended Dec. 11, 1893, 150 *U. S.* 713, 37 *L. ed.* 1239.

Clauses 1 to 7 promulgated December 22, 1911

Clause 8 promulgated April 1, 1912.

Decisions

The court requires a statement of the case even though the question is a question of fact. *Riley v. Lamar*, 2 *Cranch*, 344-347, note, 2 *L. ed.* 302, Feb. T., 1804.

Where plaintiff in error has filed no assignments of error or brief as required by Rule 21, the judgment will be affirmed. *Ryan v. Koch*, 17 *Wall.* 19, 21 *L. ed.* 611, Dec. T., 1872.

Where the case was submitted by the appellants without any brief filed, the court stated that compliance with Rule 21 would be insisted upon and, because disregarded, dismissed the appeal. *Portland Co. v. United States*, 15 *Wall.* 1-3, 21 L. ed. 114, Dec. T., 1872.

A cause dismissed for failure to furnish the court with a statement of the points in the case may afterwards be reinstated by consent of the parties. *Schooner Catherine v. United States*, 7 *Cranch*, 99, 3 L. ed. 281, Feb. T., 1812.

Strictly in chancery practice no exceptions to a master's report can be made which were not taken before the master; the object being to give the master an opportunity to correct his errors, or reconsider his opinion. Exceptions to reports of masters in chancery are in the nature of a special demurrer; the party objecting must point out the error, otherwise the part not excepted to will be taken as admitted. Exceptions which indicate nothing but dissatisfaction with the entire report, and furnish no specific grounds of error by which the objecting party has suffered any wrong will be disregarded. *Story v. Livingston*, 13 *Pet.* 359-366, 10 L. ed. 203.

The Supreme Court will not review a master's report upon exceptions taken for the first time in that court. *McMickin v. Perin*, 18 *How.* 507, 15 L. ed. 506.

Subdivision 2 of Clause 2, Rule 21, presupposes that the particular exception relied upon was taken in the court below, and was passed upon by the court adversely to the appellant.

Proper practice requires that objections to the master's report shall be taken in the trial court, that any errors discovered therein may be rectified by the court itself, or upon reference to the master for correction. *Topliff v. Topliff*, 145 *U. S.* 156-172, 36 L. ed. 665.

Where the only exception taken at the trial, and embodied in the assignment of errors, is the refusal of the trial court to charge, that under the evidence the plaintiff is not entitled to recover, plaintiff in error cannot obtain a reversal of the judgment for lack of evidence that plaintiff was not the party authorized by statute to sue. Such an assignment of error held too broad and general to bring up such a specific objection and not a compliance with Rule 21; that the court could not be put to the labor of examining the whole evidence to see whether there was enough for the verdict to rest on. *Grand Trunk R. Co. v. Ives*, 144 *U. S.* 408, 36 L. ed. 488.

Failure to present and insist upon errors assigned in the court below constitute an abandonment or waiver of all errors so assigned, not vital to the question of jurisdiction, or the foundation of the right.

The court can only be called upon to consider such assignments as are pressed upon its attention, or noticed in the decree of the court below. *Old, Jordan N. & M. Co. v. Société Anonyme de Mines*, 164 *U. S.* 261-264, 41 L. ed. 428, Oct. T., 1896.

Where no assignments of error are sent up with the record as required by sec. 997, *Rev Stats. (U. S. Comp. Stats. 1901, p. 712)*, and no specifications of the errors relied upon as required by Rule 21, the writ will be dismissed. *Rowe v. Phelps*, 152 *U. S.* 87-88, 38 L. ed. 365, Oct. T., 1893.

Only such questions as are specified in the assignment of errors are in general to be regarded as open to the plaintiff in error. It is very doubtful whether an assignment that the decision of the trial court is for the wrong party is sufficient to present any question to the appellate court for decision. *Scholey v. Rew*, 23 *Wall.* 331-345, 23 L. ed. 101, Oct. T., 1874.

Errors not assigned in a manner required by Rule 21 will be treated as if not made. *Deutsch v. Wiggins*, 15 *Wall.* 539-546, 21 L. ed. 229, Dec. T., 1872.

Where counsel present an unlimited number of assignments in perversion of the rule requiring assignments of error to enable the court and opposite counsel to see upon what points the plaintiff's counsel intend to ask a reversal, the court will only respond to such points as seem material to the judgment which it must render. *Philipps and Colby Co. v. Seymore*, 91 *U. S.* 646-648, 23 L. ed. 342, Oct. T., 1875.

An assignment of error that the court erred in giving instructions in the general charge in lieu of the instructions asked for, but which fails to state in what the error consisted, or in what part of the charge the error is contained, fails to comply with Rule 21. *Lucas v. Brookes*, 18 *Wall.* 436-456, 21 L. ed. 784, Oct. T., 1873.

Failure to annex to or return with the writ of error an assignment of errors as required by sec. 997, *Rev. Stats. (U. S. Comp. Stats. 1901, p. 712)*, is not ground for dismissal for want of jurisdiction. If the assignment is filed in accordance with Paragraph 2, Rule 21, it will ordinarily be enough. *Independent School District v. Hall*, 106 *U. S.* 428-429, 27 L. ed. 237, Oct. T., 1882.

Where the case is submitted by defendant in error on brief and there is no appearance by plaintiff in error and no assignment of errors as required by sec. 997, *Rev. Stats. (U. S. Comp. Stats. 1901, p. 712)*, and Paragraph 2 of Rule 21, judgment will be affirmed under Paragraph 4 of the same rule for want of due prosecution of the writ of error. *Dugger v. Tayloe*, 121 *U. S.* 286, 30 L. ed. 947, Oct. T., 1886.

Where no errors had been assigned either upon the record or in the briefs of counsel as required by Rule 21, the court, instead of affirming the decree without looking into the record, proceeded to consider the points presented in the briefs, announcing that this should not be deemed a precedent. *Ober v. Gallagher*, 93 *U. S.* 199-203, 23 L. ed. 830, Oct. T., 1876.

The rule applied and case dismissed under Clause 5. *Benites v. Hampton*, 123 *U. S.* 519-521, 31 L. ed. 261, Oct. T., 1887.

Where the defendant in error had permitted the cause to be brought to a hearing without appearing by counsel and without any argument of the questions involved, an opinion was withheld and the cause continued for argument upon motion of counsel as *amicus curiæ*, stating that the questions at issue were of general concern. *Green v. Biddle*, 8 *Wheat.* 1-8, 5 L. ed. 552, Feb. T., 1823.

The court has jurisdiction to allow counsel to file briefs as *amicus curiæ* in any case.

Where it does not appear that an applicant to file briefs is interested in any other case to be affected by the decision and the parties are represented by competent counsel, leave to file will be denied. *Northern Securities Co. v. United States*, 191 *U. S.* 555, 48 L. ed. 299, Oct. T., 1903.

Where a State statute cited is not printed in or with the brief as required by Rule 21, a submission under Rule 20 will be set aside and the cause restored to its place on the docket. *School District v. Insurance Co.*, 101 *U. S.* 472, 25 L. ed. 868, Oct. T., 1879.

Where a deposition, excluded because the witness was present in court orally testifying, is not in or made a part of the record, the court cannot decide that its exclusion as evidence was error. *Whitney v. Fox*, 166 *U. S.* 637-645, 41 L. ed. 1148, Oct. T., 1896.

A party may not appeal from a decree in his favor because the judge has given no reasons, or recited insufficient ones for a judgment admitted to be correct. *Corning v. Troy I. & N. Factory*, 15 *How.* 451-465, 14 L. ed. 774, Dec. T., 1853.

Where there is no cross-appeal the court will not consider errors assigned by the appellee. *The Stephen Morgan v. Good*, 94 *U. S.* 599-600, 24 L. ed. 266, Oct. T., 1876.

Although there may be manifest error in the judgment prejudicial to the defendant in error, it will not be corrected on the plaintiff's writ and assignments of error. *Tilden v. Blair*, 21 *Wall.* 241-249, 22 L. ed. 634, Oct. T., 1874.

Where a cause has been referred to a master to state an account, his conclusions depending upon an examination of books and oral testimony, and perhaps the opinions of experts, have every reasonable presumption in their favor, and are not to be set aside or modified unless there clearly appears to have been error or mistake on the part of the master. *Camden v. Stuart*, 144 U. S. 104, 36 L. ed. 368.

RULE XXII—*Oral Arguments*

1. The plaintiff in error or appellant in this court shall be entitled to open and conclude the argument of the case. But when there are cross-appeals they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument.

2. Only two counsel will be heard for each party on the argument of a case.

3. One and one-half hours on each side will be allowed for the argument, and no more, without special leave of the court, granted before the argument begins. But in cases certified from the Circuit Courts of Appeals, cases involving solely the jurisdiction of the court below, and cases under the Act of March 2, 1907, 34 Stat. 1246, forty-five minutes only on each side will be allowed for the argument unless the time be extended. The time thus allowed may be apportioned between the counsel on the same side, at their discretion; provided, always, that a fair opening of the case shall be made by the party having the opening and closing arguments.

Clause 1 promulgated in the revision of 1859, 21 *How.* xiii; 108 U. S. 586; amended October Term, 1911.

Clause 2 adopted as Rule 23 at the February Term, 1812, 1 *Wheat.* xviii; published in 1 *Pet.* ix and 1 *How.* xxviii. Became Clause 1 of Rule 21 in the revision of 1859, 21 *How.* xii; 11 *Wall.* ix; amended Nov. 16, 1872, 14 *Wall.* xi. Made Clause 2 of Rule 22 in the revision of 1884, 108 U. S. 586.

Clause 3 promulgated as Rule 53 at the December Term, 1849, 7 *How.* v; 8 *How.* v. Made Clause 2 of Rule 21 in the revision of 1859, 21 *How.* xii; 11 *Wall.* ix; 14 *Wall.* xi. Made part of Rule 22, Jan. 7, 1884, 108 U. S. 586; amended October Term, 1911.

Promulgated December 22, 1911. 222 U. S.

Decisions

The limitation prescribed by Clause 3 of the rule is dispensed with only in causes of great public importance. *McCulloch v. Maryland*, 4 *Wheat.* 316-322, 4 L. ed. 580, Feb. T., 1819.

Only two counsel will be heard on each side, whatever the number of points or parties in the case. *Anon.*, 7 *Cranch*, 1, 3 L. ed. 249, Feb. T., 1812.

Counsel for parties not in the record who may think themselves interested cannot be heard. The court knows only the parties in the record. If the court sees that the proper parties are not before it, they will act as may be required. *Harrison v. Nixon*, 9 *Pet.* 483-494, 9 L. ed. 205, Jan. T., 1835

Appellee may be heard in support of a decree but not for its reversal, as it is the privilege of both parties to appeal, if they see fit to comply with the conditions prescribed by law. *New Orleans Mail Co. v. Flanders*, 12 *Wall.* 130-135, 20 L. ed. 250, Dec. T., 1870.

The rule is settled that no one but an appellant can be heard for the reversal of a decree of a subordinate court. *The William Bagley v. United States*, 5 *Wall.* 377-412, 18 L. ed. 591, Dec. T., 1866.

All suits civil or criminal prosecuted in the name and for the benefit of the United States are subject to the direction and within the control of the Attorney-General. *Confiscation Cases*, 7 *Wall.* 454-458, 19 L. ed. 198, Dec. T., 1868.

In causes where the United States is represented by counsel from the Law Department no counsel on behalf of other departments of the Government in opposition will be heard. *The Steamer Grey Jacket*, 5 *Wall.* 370, 18 L. ed. 446, Dec. T., 1866.

RULE XXIII—*Interest*

1. In cases where a writ of error is prosecuted to this court, and the judgment of the inferior court is affirmed, the interest shall be calculated and levied, from the date of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the State where such judgment is rendered.

On affirmance, interest from date of judgment below at same rate allowed as State judgments where rendered.

2. In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at a rate not exceeding 10 per cent, in addition to interest, shall be awarded upon the amount of the judgment.

Not exceeding ten per cent as damages on writ of error for delay.

3. The same rule shall be applied to decrees for the payment of money in cases in equity, unless otherwise ordered by this court.

In admiralty, damages and interest if specially directed.

4. In cases in admiralty, damages and interest may be allowed if specially directed by the court.

Clause 1, substantially the same as Rules 17 and 18, promulgated at the February Term, 1803, 1 *Cranch*, xviii; 1 *Wheat*. xvi; 1 *How*. xxvi; and Rule 20 promulgated at the February Term, 1807, 1 *How*. xxvii. Promulgated as Rule 62 at the December Term, 1851, 13 *How*. v, to conform to the Act of Congress of Aug. 23, 1842 (5 *Stat. L.* 518). Sec. 966, *Rev. Stats.* Made Clause 1 of Rule 23 in the revision of 1859, 21 *How*. xiii.

Clause 2 adopted as Rules 17 and 18 at the February Term, 1803, 1 *Cranch*, xviii; 1 *Wheat*. xvi; 1 *Pet.* vii; 1 *How*. xxvi. Made Clause 3 of Rule 23 in the revision of 1859, 21 *How*. xiii. Became Clause 2 of Rule 23 in the revision of May 1, 1871, 11 *Wall*. x; 108 *U. S.* 586.

Clause 3 promulgated as Clause 2 of Rule 62 at the December Term, 1851, 13 *How*. v; published 21 *How*. xiii. Made Clause 3 of Rule 23 in the revision of May 1, 1871; 11 *Wall*. x; 108 *U. S.* 586.

Clause 4 promulgated Jan. 7, 1884, 108 *U. S.* 586; amended Mar. 10, 1890, 133 *U. S.* 711.

Promulgated December 22, 1911. 222 *U. S.*

Decisions

A case cannot be dismissed on motion simply because the court may be of the opinion that it was brought for delay only, but the court may award damages under sec. 1010, *Rev. Stats.* (*U. S. Comp. Stats.* 1901, p. 715), and Rule 23, if it appears that the writ of error has been sued out simply for delay. *Amory v. Amory*, 91 *U. S.* 355-357, 23 L. ed. 436, Oct. T., 1874.

A party should not be subjected to the delay of proceedings for review without reasonable cause. The only way to discourage frivolous appeals and writs of error is by the use of the power to award damages. *Whitney v. Cook*, 99 *U. S.* 607, 25 L. ed. 446, Oct. T., 1878.

It is solely for the discretion of the Supreme Court whether damages or interest are to be allowed in case of affirmance. If upon affirmance no allowance of interest or damages is made, the Circuit (District) Court cannot enlarge the amount thereby decreed. *Boyce v. Grundy*, 9 *Pet.* 275-290, 9 L. ed. 132, Jan. T., 1835.

Where the writ of error is sued out with no *bona fide* attempt to question former adjudications of the Supreme Court, settling the question at issue adversely to the plaintiff, it will be regarded as prosecuted for delay. *Pennywit v. Eaton*, 15 *Wall.* 382-384, 21 L. ed. 114, Dec. T., 1872.

Where plaintiff in error did not pretend to have any defense in the court below, refused to plead in bar, and did not pretend to allege any

error in proceedings, the judgment was affirmed with ten per cent damages. *Sutton v. Bancroft*, 23 *How.* 320-321, 16 L. ed. 454, Dec. T., 1859.

Where the errors alleged are frivolous, the writ of error will be deemed taken for delay and damages awarded. *Nelson v. Flint*, 166 *U. S.* 276-280, 41 L. ed. 1003, Oct. T., 1896.

Where the writ of error has no plausible ground to support it and has been sued out merely for delay, the judgment will be affirmed with interest and damages. *Texas & Pacific Ry. Co. v. Volk*, 151 *U. S.* 73-79, 38 L. ed. 80, Oct. T., 1893.

Judgments at common law, whatever the cause of action, bore interest. By the Act of Aug. 23, 1842 (5 *Stat. L.* 516, chap. 188) Congress enacted that interest on judgments in civil cases recovered in the Federal courts be allowed at the rate allowed in the courts of the State where the court is held (sec. 966, *Rev. Stats. U. S. Comp. Stats.* 1901, p. 700) and by the 23rd sec. of the Judiciary Act of 1789 (sec. 1010, *Rev. Stats. U. S. Comp. Stats.* 1901, p. 715) it was enacted that upon affirmance of a judgment by the Supreme Court, damages shall be adjudged, and single or double costs at the discretion of that court. By various rules the court has regulated this delegated jurisdiction. *Washington & G. R. Co. v. Tobriner*, 147 *U. S.* 571-586, 37 L. ed. 291.

On affirmance where the writ is for mere delay, ten per cent damages may be awarded in addition to interest, and interest is given that similar judgments bear in the courts of the State where the judgment was rendered. The same rule applies to money decrees, but the question of interest is solely for the court to determine, as the Act of 1842 did not repeal sec. 23 of the Judiciary Act. *Ib.*

Because of the coincidence between a dismissal on account of the unsubstantial character of the Federal question relied on to bring the case from the highest court of a State and an affirmance of the judgment rendered by such State court, the Statutory authority given the Supreme Court by sec. 1010, *Rev. Stats., U. S. Comp. Stats.* 1901, p. 715, may be exercised where there is an order of dismissal of such a case brought from the highest court of a State. *Deming v. Carlisle Packing Co.*, 226 *U. S.* 102, 57 L. ed. 141.

Under the former rules just damages for delay took the place of interest during the delay. The present rules make a radical change and require the court to consider the damages as something distinct from that of interest. Where the defense, though not in law a good one, shows circumstances in mitigation of damages in excess of interest the court may award less than ten per cent, though the rule

fixes the amount beyond which it cannot go. *West Wisconsin Co. v. Foley*, 94 *U. S.* 100-104, 24 L. ed. 72, Oct. T., 1876.

In a cause brought up by writ of error upon exceptions to the refusal of the court to continue the case until the next term, such continuance being a matter of judicial discretion, where upon examination of the reason assigned it appeared that such continuance was but to delay the payment of a just debt, the court affirmed the judgment and awarded damages. *Barrow v. Hill*, 13 *How.* 54-56, 14 L. ed. 49, Dec. T., 1851.

Where the decree of the Supreme Court is misunderstood or misconstrued as to the interest allowed, the matter may be brought before that court upon motion and a mandamus issued to compel its execution, or by appeal from the decision of the court below. *Perkins v. Fourniquet*, 14 *How.* 328-330, 14 L. ed. 442, Dec. T., 1852.

Discretion vested in the court by sec. 23 of the Act of 1789, to give damages, extends to decrees in equity and the rule has always been applied to cases in equity as well as in law. *Ib.*

Rule 23 before amendment was not applicable to admiralty cases. *The Douro*, 3 *Wall.* 564-566, 18 L. ed. 169, Dec. T., 1865.

The rule then applied in cases of law and equity only. *Hemenway v. Fisher*, 20 *How.* 255-258, 15 L. ed. 800, Dec. T., 1857.

Where at the time of suing out a writ of error the law upon the questions at issue has not been settled, and the writ is prosecuted in good faith in the expectation of obtaining a reversal, damages will not be awarded. *McKee v. Rains*, 10 *Wall.* 22-26, 19 L. ed. 862, Dec. T., 1869.

Though the defendants in error, if they had seasonably applied, would be entitled to an affirmance of the judgment with an allowance of interest, if the cause has been dismissed on the motion of plaintiff in error, the court has no power after the term has passed to alter its judgment to one of affirmance with its legal consequences unless it has specially reserved the right to do so. *Schell v. Dodge*, 107 *U. S.* 629-630, 27 L. ed. 601, Oct. T., 1882.

Under Rule 23 where a writ of error brought by a collector of customs to review a judgment recovered against him for moneys exacted on entries is affirmed, interest will be allowed. Such interest for the time a writ of error is pending is really damages for delay. *Cochran v. Schell*, 107 *U. S.* 625-628, 27 L. ed. 545, Oct. T., 1882.

Where the mandate of the Supreme Court allowing interest goes to the court below, it is necessary that that court enter a further judgment in accordance with the mandate, covering the interest and costs. *Ib.* 628.

The damages are calculated from the date of the judgment in the

court below, until the money is paid. *Jenkins v. Banning*, 23 *How.* 455-457, 16 L. ed. 581, Dec. T., 1859.

Interest or damages cannot be given by the Circuit Court in the execution of a mandate, where the same has not been decreed by the Supreme Court. *The Santa Maria*, 10 *Wheat.* 431-442, 6 L. ed. 361, Feb. T., 1825.

RULE XXIV—Costs

1. In all cases where any suit shall be dismissed in this court, costs shall be allowed to the defendant in error or appellee, unless otherwise agreed by the parties, except where the dismissal shall be for want of jurisdiction, when the costs incident to the motion to dismiss shall be allowed.

On dismissal, costs to defendant in error, except dismissal for want of jurisdiction.

2. In all cases of affirmance of any judgment or decree in this court, costs shall be allowed to the defendant in error or appellee, unless otherwise ordered by the court.

On affirmance, costs to defendant in error.

3. In cases of reversal of any judgment or decree in this court, costs shall be allowed to the plaintiff in error or appellant, unless otherwise ordered by the court. The cost of the transcript of the record from the court below shall be a part of such costs, and be taxable in that court as costs in the case.

On reversal, costs to plaintiff in error, including costs of transcript.

4. Neither of the foregoing sections shall apply to cases where the United States are a party; but in such cases no costs shall be allowed in this court for or against the United States.

Clauses 2 and 3 not to apply when United States a party.

5. In all cases of the dismissal of any suit in this court, it shall be the duty of the clerk to issue a mandate, or other proper process, in the nature of a *procedendo*, to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain.

On dismissal a *procedendo* goes to court below.

6. When costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below, and annex to the same the bill of items taxed in detail.

Costs to be inserted in the mandate and bill of costs annexed.

7. In pursuance of the Act of March 3, 1883, authorizing
Table of fees. and empowering this court to prepare a
table of fees to be charged by the clerk of this court, the
following table is adopted:

For docketing a case and filing and indorsing the transcript
of the record, five dollars.

For entering an appearance, twenty-five cents.

For entering a continuance, twenty-five cents.

For filing a motion, order, or other paper, twenty-five
cents.

For entering any rule, or for making or copying any record
or other paper, twenty cents per folio of each one hundred
words.

For transferring each case to a subsequent docket and
indexing the same, one dollar.

For entering a judgment or decree, one dollar.

For every search of the records of the court, one dollar.

For a certificate and seal, two dollars.

For receiving, keeping, and paying money in pursuance of
any statute or order of court, two per cent on the amount so
received, kept, and paid.

For an admission to the bar and certificate under seal, ten
dollars.

For preparing the record or a transcript thereof for the
printer, indexing the same, supervising the printing, and
distributing the printed copies to the justices, the reporter,
the law library, and the parties or their counsel, fifteen cents
per folio; but when the necessary printed copies of the rec-
ord, as printed for the use of the lower court, shall be
furnished, the fee for supervising shall be five cents per
folio.

For making a manuscript copy of the record, when re-
quired under Rule 10, twenty cents per folio, but nothing in
addition for supervising the printing.

For issuing a writ of error and accompanying papers,
five dollars.

For a mandate or other process, five dollars.

For filing briefs, five dollars for each party appear-
ing.

For every printed copy of any opinion of the court or any justice thereof, certified under seal, two dollars.

NOTE. In the revision of December Term, 1858, 21 *How.* ix, Clause 6 of Rule 10 read as follows: In cases of dismissal for want of jurisdiction, each party shall be charged with one-half the legal fees for a copy (of the record); amended May 8, 1876, 91 *U. S.* vii to read: In all cases of dismissal for want of jurisdiction the fees for the copy shall be taxed against the party bringing the cause into court, unless the court shall otherwise direct.

Clause 1 promulgated at the January Term, 1838 as Rule 45, 12 *Pet.* vii; 1 *How.* xxxvi. Made Clause 1 of Rule 24 in the revision of 1859, 21 *How.* xiii; 108 *U. S.* 587.

Clause 2 promulgated as Rule 46 at the January Term, 1838, 12 *Pet.* vii; published as Clause 2 of Rule 45 in 1 *How.* xxxvi. Made Clause 2 of Rule 21 in the revision of 1859, 21 *How.* xiv; 108 *U. S.* 587.

Clause 3 promulgated at the February Term, 1810, as Rule 22, 1 *Wheat.* xvii; 1 *Pet.* viii. Made Rule 47 at the January Term, 1838, 12 *Pet.* vii; published as Clause 3 of Rule 45 in 1 *How.* xxxvi. Made Clause 3 of Rule 24 in the revision of 1859, 21 *How.* xiv; amended Apr. 18, 1864, 1 *Wall.* v; published in 108 *U. S.* 587.

Clause 4, original Rule 48, promulgated at the January Term, 1838, 12 *Pet.* vii; published as Clause 4 of Rule 45, 1 *How.* xxxvi. Made Clause 4 of Rule 24 in the revision of 1859, 21 *How.* xiv; 108 *U. S.* 587.

Clause 5 promulgated at the January Term, 1858, as Rule 49, 12 *Pet.* vii; published as Clause 5 of Rule 45 in 1 *How.* xxxvi. Made Clause 5 of Rule 21 in the revision of 1859, 21 *How.* xiv; 108 *U. S.* 587.

Clause 6 promulgated at the January Term, 1838, as Rule 50, 12 *Pet.* vii; published as Clause 6 of Rule 45 in 1 *How.* xxxvi. Made Clause 6 of Rule 24 in the revision of 1859, 21 *How.* xiv; 108 *U. S.* 587.

Clause 7 promulgated Jan. 7, 1884, 108 *U. S.* 587; amended October Term, 1911. Promulgated December 22, 1911. 222 *U. S.*

Decisions

The United States is not liable for costs. *United States v. Boyd*, 5 *How.* 29-51, 12 L. ed. 46, Jan. T., 1847.

No court can make a direct judgment or decree against the United States for costs or expenses in a suit to which the United States is a party, either on behalf of any suitor or of any officer of the Government. *The Antelope*, 12 *Wheat.* 546-550, 6 L. ed. 725, Jan. T., 1827.

Prior to the adoption of the rule the court directed the clerk, that in cases of reversal, costs do not go of course, but in all cases of affirmance they do. When a judgment is reversed for want of jurisdiction, it must be without costs. *Montalet v. Murray*, 4 *Cranch*, 46-47, 2 L. ed. 546, Feb. T., 1807.

The Supreme Court cannot give a judgment for costs in a case dismissed for want of jurisdiction. *Strader v. Graham*, 18 *How.* 602, 15 L. ed. 464, Dec. T., 1855.

Where the suit fails for want of jurisdiction the court has no authority to award costs against the losing party, as a general rule, or

unless the authority is conferred by statute. *Mansfield, etc., Co. v. Swan*, 111 U. S. 379-387, 28 L. ed. 465, Oct. T., 1883.

The Supreme Court has jurisdiction to determine the jurisdiction of the Circuit (District) Court, and in a cause where that court wrongly exercises jurisdiction at the instance of the plaintiff in error, in order to do what justice and right require, may award costs against the successful party when a judgment is reversed for want of jurisdiction in the court below. *Ib.* 386.

The plaintiff in error is then the losing party in the sense of having ineffectually invoked the jurisdiction of the Circuit (District) Court. *Ib.* 386.

The court states it has no formal rule which covers the matter of costs in the case of a reversal on the ground that the lower court did not have jurisdiction, but that Clause 3 of Rule 24 authorizes a discretion in its application to such cases. *Ib.* 389.

As a general rule an appeal will not lie in the matter of costs alone, but when the entire decree is appealed from, it is competent for the Supreme Court to consider whether the Circuit (District) Court can give a decree for costs when it dismisses a suit for want of jurisdiction. *Held*, that the Circuit (District) Court, having dismissed the bill for want of jurisdiction, is without power to decree the payment of costs, including an attorney's fee in the nature of a penalty. *Citizens' Bank v. Cannon*, 164 U. S. 319-323, 41 L. ed. 453, Oct. T., 1896.

Where the Circuit (District) Court is without jurisdiction it has no power to do anything but strike the case from the docket and its award of costs is void. *Nashville v. Cooper*, 6 Wall. 247-251, 18 L. ed. 852, Dec. T., 1867.

Where the trial court dismissed the action with costs, *Held*, it must have proceeded upon the merits, for if the dismissal had been for want of jurisdiction, no costs could have been awarded. *Elk v. Wilkins*, 112 U. S. 94-98, 28 L. ed. 645, Oct. T., 1884.

Jurisdiction to correct what has been wrongfully done remains with a court so long as the parties in the case remain before it, either in the first instance or when remanded to it by an appellate tribunal, and where the judgment of the Circuit Court has been reversed for want of jurisdiction it has power, after the case is remanded, to render a judgment in favor of the defendant for the moneys wrongfully collected from him by the plaintiff. *Northwestern Fuel Co. v. Brock*, 139 U. S. 216-219, 35 L. ed. 153, Oct. T., 1890.

Mr. Justice Brewer states that he had supposed the law to be otherwise; that if the court had no jurisdiction to render a judgment against one party it was equally without jurisdiction thereafter in the same case to render a judgment against the other party, and announced

that he was glad to know that he was mistaken as to the jurisdiction of a court to render a judgment for the restitution of money wrongfully collected, on a judgment reversed. *Ib.* 221.

Where a case is dismissed for want of jurisdiction on the face of the pleadings, as a general rule costs will not be allowed. That the defendant in the court below is the defendant in the Supreme Court sometimes constitutes an exception. Where costs are improperly allowed in favor of the defendant in the court below, who is also defendant in the Supreme Court, he is not entitled to the benefit of such exception, as the decree in his favor must be reversed to correct that error. *Hornthal v. Keary*, 9 *Wall.* 560-567, 19 L. ed. 562, Dec. T., 1869.

Where the original defendant was also the defendant in error, on dismissal of the writ of error for want of jurisdiction the court directed it to be dismissed with costs. *Winchester v. Jackson*, 3 *Cranch*, 514, 2 L. ed. 516, Feb. T., 1806.

Where an appeal was from a decree dismissing a bill filed to enjoin the destruction of a building and the erection of a new one in its place, and it appeared the new structure had been erected pending the litigation, and the only ground for further prosecution of the appeal was as to the costs of suit, *Held* the appeal must be dismissed. *Wingert v. First National Bank of Hagerstown*, 223 *U. S.* 670, 56 L. ed. 605.

The general rule recognized as to costs between party and party, confined to the taxed costs allowed by the fee bill, but held inapplicable to costs and expenses directed to be paid out of a fund in court and not by parties to the suit, where the inquiry is a collateral one having a distinct and independent character, and has received a final decision in the trial court. *Trustees v. Greenough*, 105 *U. S.* 527, 26 L. ed. 1157.

Where the clerk has no security for his fees charged to the prevailing party it is not improper for him to withhold the mandate. *Osborn v. United States*, 23 L. ed. 872.

NOTE. This case is printed only in the Lawyers' edition.

In all cases of reversal, if the Supreme Court directs the court below to enter judgment for plaintiff in error, it will of course enter the judgment with the costs of that court. *McKnight v. Craig*, 6 *Cranch*, 183-187, 3 L. ed. 194, Feb. T., 1810.

If an appeal be taken from a decree upon the merits, and such decree be affirmed with respect to the merits, it will not be reversed upon the question of costs. *Du Bois v. Kirk*, 158 *U. S.* 58-67, 39 L. ed. 899, Oct. T., 1894.

Costs in equity and admiralty cases are within the sound discretion of the trial court. *Ib.* 67.

The allowance as costs, of the fee of a solicitor by whose exertions a fund to be administered is recovered is proper, and in fixing the amount the court may proceed upon its own knowledge of the value of the solicitor's services. *Harrison v. Perea*, 168 *U. S.* 311-325, 42 L. ed. 483, Oct. T., 1897.

RULE XXV—*Opinions of the Court*

1. All opinions delivered by the court shall, immediately upon the delivery thereof, be handed to the clerk to be printed. And it shall be the duty of the clerk to cause the same to be forthwith printed, and to deliver a copy to the reporter as soon as the same shall be printed.

2. The original opinions of the court shall be filed with the clerk of this court for preservation.

3. Opinions printed under the supervision of the justices delivering the same need not be copied by the clerk into a book of records; but at the end of each term the clerk shall cause such printed opinions to be bound in a substantial manner into one or more volumes, and when so bound they shall be deemed to have been recorded.

Clause 1 promulgated at the January Term, 1835; published in 1 *How.* xxxv. Became Clause 1 of Rule 25 in the revision of 1859, 21 *How.* xiv; 108 *U. S.* 588; amended October Term, 1911.

Clause 2 promulgated Mar. 14, 1834, 8 *Pet.* vii; published as Rule 41 in 1 *How.* xxxv. Became Clause 3 of Rule 25 in the revision of 1859, 21 *How.* xiv, and also in the revision of May 1, 1871, 11 *Wall.* x. Made Clause 2 of Rule 25, Jan. 7, 1884, 108 *U. S.* 588.

Clause 3 promulgated January Term, 1835; published in 1 *How.* xxxv. Made Clause 2 of Rule 25 in the revision of 1859, 21 *How.* xiv; amended as published as Rule 25, Jan. 7, 1884, 108 *U. S.* 588; amended October Term, 1911.

Promulgated December 22, 1911. 222 *U. S.*

Decisions

Prior to the adoption of Clause 1 certified copies of the opinion could be given by the reporter. *Anonymous*, 3 *Pet.* 397, 7 L. ed. 719.

Where the decision involves no difficult or doubtful questions of law, but a pure question of fact depending on the weight and comparison of varying and conflicting evidence, the court will not deliver an extended opinion. *Tyler v. Campbell*, 106 *U. S.* 322, 27 L. ed. 162, Oct. T., 1882.

In such cases the court is not justified in reproducing in its opinion the facts on which its judgment rests. *Harrell v. Beall*, 17 *Wall.* 590-591, 21 L. ed. 693, Oct. T., 1873.

The court takes judicial notice of its own opinions, which it may properly examine in order to determine what matters were considered and upon what grounds the judgment was entered. *Thompson v. Maxwell L. G. and R. Co.*, 168 *U. S.* 451-456, 42 L. ed. 541, Oct. T., 1897.

RULE XXVI—*Call and Order of the Docket*

1. The court, on the second day in each term, will commence calling the cases for argument in the order in which they stand on the docket, and proceed from day to day during the term in the same order (except as hereinafter provided); and if the parties, or either of them, shall be ready when the case is called, the same will be heard; and if neither party shall be ready to proceed in the argument, the case shall be continued to the next term of the court unless some good and satisfactory reason to the contrary shall be shown to the court.

Cases called in order from second day of term.—If neither party ready case goes to next term.

2. Ten cases only shall be considered as liable to be called on each day during the term. But on the coming in of the court on each day the entire number of such ten cases will be called, with a view to the disposition of such of them as are not to be argued.

Ten cases called daily on coming in of court.

3. Criminal cases may be advanced by leave of the court on motion of either party.

Criminal cases may be advanced on motion.

4. Cases once adjudicated by this court upon the merits, and again brought up by writ of error or appeal, may be advanced by leave of the court on motion of either party.

Cases formerly adjudicated may be advanced on motion.

5. Revenue and other cases in which the United States are concerned, which also involve or affect some matter of general public interest, or which may be entitled to precedence under the provisions of any act of Congress, may also by leave of the court be advanced on motion of the attorney-general.

Revenue and other cases advance on motion of attorney-general of United States.

6. All motions to advance cases must be printed, and must contain a brief statement of the matter involved, with the reasons for the application.

7. No other case will be taken up out of the order on the docket, or be set down for any particular day, except under special and peculiar circumstances to be shown to the court.

8. Two or more cases, involving the same question, may, by the leave of the court, be heard together, but they must be argued as one case.

9. If, after a case has been passed, the parties shall desire to have it heard, they may file with the clerk their joint request to that effect, and the case shall then be by him reinstated for call ten cases after that under argument, or next to be called at the end of the day the request is filed. If the parties will not unite in such a request, either may move to take up the case, and it shall then be assigned to such place upon the docket as the court may direct.

10. No stipulation to pass a case will be recognized as binding upon the court. A case can only be so passed upon application made and leave granted in open court.

Clause 1 promulgated at the January Term, 1830; published in 3 *Pet.* xvi, having been omitted by mistake from 1 *Pet.* Published as Rule 36 in 1 *How.* xxxiii. Made Clause 1 of Rule 26 in the revision of 1859, 2 *How.* xv; amended October Term, 1911.

Clause 2 promulgated at the March Term, 1830; published in 3 *Pet.* vi. Published as part of Rule 36 in 1 *How.* xxxiii. Became part of Rule 26 in the revision of 1859, 21 *How.* xv; published as Clause 2 of Rule 26 in 108 *U. S.* 589.

Clause 3 promulgated as Clause 2 of Rule 2 at the December Term, 1866, 4 *Wall.* vii. Made Clause 3 of Rule 26 in the revision of May 1, 1871, 11 *Wall.* xi; 106 *U. S.* 589.

Clause 4 promulgated Jan. 7, 1884, 108 *U. S.* 589.

Clause 5 promulgated as Clause 3 of Rule 2 at the December Term, 1866, 4 *Wall.* vii. Made Clause 4 of Rule 26 in the revision of May 1, 1871, 11 *Wall.* xi. Became Clause 5 in the revision of 1884, 108 *U. S.* 589; amended October Term, 1911.

Clause 6 promulgated May 3, 1875, as an amendment of Clause 4, 21 *Wall.* v. Made Clause 6 Jan. 7, 1884, 108 *U. S.* 589.

Clause 7 promulgated at the January Term, 1830; published in 3 *Pet.* xvii. Made part of Rule 36; amended Feb. 5, 1840, 14 *Pet.* xi; published as part of Rule 36, 1 *How.* xxxiii and 21 *How.* xv. Made Clause 5 of Rule 26 in the revision of May 1, 1871, 11 *Wall.* xi; published as Clause 7 of Rule 26 in 108 *U. S.* 589.

Clause 8 promulgated at the December Term, 1866. Clause 4 of Rule 2, 4 *Wall.* vii. Made Clause 6 of Rule 26 in the revision of May 1, 1871. Became Clause 8 of Rule 26, Jan. 7, 1884; 108 *U. S.* 589.

Clause 9 promulgated Jan. 18, 1875, 20 *Wall.* xvi; published in 108 *U. S.* 589.

Clause 10 promulgated Jan. 18, 1875, 20 *Wall.* xvi; published in 108 *U. S.* 590.

Promulgated December 22, 1911. 222 *U. S.*

Decisions

The rule requiring causes to be ready for hearing when reached will be rigidly enforced. *Hurley v. Jones*, 97 *U. S.* 318-319, 24 L. ed. 1009, Oct. T., 1878.

The regular order can be varied only where the question in dispute will embarrass the Government while it remains unsettled. No case can be taken out of its regular order on the docket where private interests only are concerned. *United States v. Fossatt*, 21 *How.* 445, 16 L. ed. 186, Dec. T., 1858.

Cases embraced by Paragraph 5 of Rule 26 will be advanced only on the motion of the attorney-general and in the discretion of the court. *Poindexter v. Greenhow*, 109 *U. S.* 63-65, 27 L. ed. 861, Oct. T., 1883.

NOTE. The opinion refers to Paragraph 4 of Rule 26, its then number.

Though the questions in controversy are serious, if the case has been sent to the foot of the calendar under Rule 26, the court will not assign a day for argument out of the regular order, where such assignment would produce public inconvenience and injustice to others. *Barry v. Mercein*, 4 *How.* 574-576, 11 L. ed. 1109, Jan. T., 1846.

NOTE. In this cause though the appearance of the plaintiff in error was delayed by an unusual length of passage from a foreign country, and by sickness, the court refused to make a special order giving the case priority.

A case in which the revenue laws of a State have been enjoined, will not be given preference unless it sufficiently appears that the operation of the government of the State will be embarrassed by the delay. *Hoge v. Richmond & D. R. Co.*, 93 *U. S.* 1-2, 23 L. ed. 781, Oct. T., 1876.

The court must determine what is sufficient reason for the priority of revenue cases granted by sec. 949, *Rev. Stats.* (*U. S. Comp. Stats.* 1901, p. 695), under all the circumstances of the case, and if no disputed principle of law affecting any other case is discovered, and no question affecting the power of the State to tax property other than that of a single litigant, the motion will be denied. *Ib.* 3.

The ordinances of a municipal corporation levying taxes, cannot be classed as revenue laws of a State within the meaning of sec. 949, *Rev. Stats.*, *U. S. Comp. Stats.* 1901, p. 695. *City of Davenport v. Downs*, 15 *Wall.* 390-392, 21 L. ed. 96, Dec. T., 1872.

Motions to advance a criminal case must state the facts in such manner that the court may judge whether the Government will be

embarrassed by delay. *United States v. Norton*, 91 *U. S.* 558, 23 L. ed. 251, Oct. T., 1875.

Under Clause 3, Rule 26, the motion is addressed to the discretion of the court, and where the defendant is not in jail a motion to advance will not be granted. *Ward v. Maryland*, 12 *Wall.* 163-164, 20 L. ed. 260, Dec. T., 1870.

A plaintiff in error convicted of an offense under State laws is not entitled to priority under the Act of June 30, 1870, sec. 949, *Rev. Stats.*, (*U. S. Comp. Stats.* 1901, p. 695). *Ib.* 164.

A case will not be advanced for argument because the court may think it has no merits. *Amory v. Amory*, 91 *U. S.* 356, 23 L. ed. 436, Oct. T., 1874.

Nor because both parties concur in a motion to advance. A suit in the name of a State upon the relation of individuals is not entitled to priority under sec. 949, *Rev. Stats.* (*U. S. Comp. Stats.* 1901, p. 695). *Miller v. New York*, 12 *Wall.* 159-161, 20 L. ed. 259, Dec. T., 1870.

When a cause is advanced to be heard with another which has precedence on the docket, the two are required to be argued together as one, except under very peculiar circumstances. The court cannot compel a party against his will to argue his cause with another. Where the court is asked to advance a case to be heard with another cause, which motion is denied, the court may allow the party to submit printed arguments in the case having priority on the questions therein presented, which are common to the two. *Louisiana v. New Orleans*, 103 *U. S.* 521, 26 L. ed. 307, Oct. T., 1880.

Because the case involves the same questions and the construction of the same statutes sought to be reviewed in another cause pending which has precedence on the docket, the court will not advance the case to be argued as one, where the motion is resisted. *Ib.* 521.

Where the questions involved have grown out of one transaction and depend on the same facts, the court will not hear arguments in cases separately and at different terms, but will order them to be argued together. *United States v. Booth*, 18 *How.* 476-479, 15 L. ed. 466, Dec. T., 1855.

RULE XXVII—*Adjournment*

The court will, at every term, announce on what day it will adjourn at least ten days before the time which shall be fixed upon, and the court will take up no case for argument, nor receive any case

Adjournment announced
ten days in advance.

upon printed briefs, within three days next before the day fixed upon for adjournment.

Promulgated as original Rule 52 at January Term, 1838, 12 *Pet.* viii; published as Rule 47 in 1 *How.* xxxvii, and made Rule 28 in the revision of the rules December Term, 1858, 21 *How.* xv. Became Rule 27 in the revision of Jan. 7, 1884, 108 *U. S.* 590.

Promulgated December 22, 1911. 222 *U. S.*

RULE XXVIII—*Dismissing Cases in Vacation*

Whenever the plaintiff and defendant in a writ of error pending in this court, or the appellant and appellee in an appeal, shall in vacation, by their attorneys of record, sign and file with the clerk an agreement in writing directing the case to be dismissed, and specifying the terms on which it is to be dismissed as to costs, and shall pay to the clerk any fees that may be due to him, it shall be the duty of the clerk to enter the case dismissed, and to give to either party requesting it a copy of the agreement filed; but no mandate or other process shall issue without an order of the court.

Promulgated as original Rule 64 at December Term, 1857, 20 *How.* iv. Made Rule 29 in the revision at the December Term, 1858, 21 *How.* xvi. Became Rule 28 at the revision Jan. 7, 1884; published in 108 *U. S.* 590.

Promulgated December 22, 1911. 222 *U. S.*

Decisions

Where an appeal was dismissed on motion of appellant's counsel, and after unreasonable delay a motion by other counsel was made to have the order of dismissal vacated and to reinstate the case upon affidavit that his former counsel acted without appellant's knowledge or consent, the court held that appellant must have had knowledge of the dismissal and by his long silence must be held to have acquiesced and ratified his counsel's act; that the motion was addressed to the discretion of the court and should be denied, though the appellee filed a consent to the motion. *Deming v. United States*, 10 *Wall.* 251-256, 19 *L. ed.* 894, Dec. T., 1869.

Where parties have an interest in the subject-matter of the suit, but are represented by the attorney-general of the United States as their attorney of record, in case the cause is dismissed upon a stipulation between the attorney-general and counsel on the other side, *Held*, in the dissenting opinion by Mr. Justice Miller, that the fact of the right and interest of the parties might be shown to the court by affidavit or in any manner to satisfy the court, and they might resist a dismissal

or apply to set aside a dismissal ordered. *United States v. Estudillo*, 1 *Wall.* 710-718, 17 L. ed. 704, Dec. T., 1863.

RULE XXIX—*Supersedeas*

Supersedeas bonds in the District Courts and Circuit Courts of Appeals must be taken, with good and sufficient security, that the plaintiff in error or appellant shall prosecute his writ or appeal to effect, and answer all damages and costs if he fail to make his plea good. Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just damages for delay, and costs and interest on the appeal; but in all suits where the property in controversy necessarily follows the event of the suit, as in real actions, replevin, and in suits on mortgages, or where the property is in the custody of the marshal under admiralty process, as in case of capture or seizure, or where the proceeds thereof, or a bond for the value thereof, is in the custody or control of the court, indemnity in all such cases is only required in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit, and just damages for delay, and costs and interest on the appeal.

Promulgated at December Term, 1867, as original Rule 32, 6 *Wall.* v. Made Rule 29 at the revision of May 1, 1871, published in 108 *U. S.* 590; amended December 22, 1911. 222 *U. S.*

Decisions

It is not necessary that all appellants join in the appeal bond, though all must join in the appeal. It is sufficient that the appeal bond is approved by the court as satisfactory security by whomsoever executed. *Brockett v. Brockett*, 2 *How.* 238-240, 11 L. ed. 252, Jan. T., 1844.

Security upon writs of error or appeals must be taken by the judge or justice. He cannot delegate this power to the clerk. *O'Reilly v. Edrington*, 96 *U. S.* 724-727, 24 L. ed. 659, Oct. T., 1877.

Where the clerk approved a bond under the order of the court below, the Supreme Court refused to dismiss the appeal and stated that the case was a proper one for the application of its rule, by which that court sometimes refuses to dismiss appeals and writs of error where

there are defects in the proceedings, except on failure to comply with imposed terms. *Ib.* 727.

Under sec. 1000, *Rev. Stats.* (*U. S. Comp. Stats.* 1901, p. 712), the power to approve the security cannot be delegated to a commissioner of court. *Haskins v. St. Louis, etc., Ry. Co.*, 109 *U. S.* 106-107, 27 *L. ed.* 873, Oct. T., 1882.

The security may be approved by the judge out of court in vacation. *Hudgins v. Kemp*, 18 *How.* 530-538, 15 *L. ed.* 514, Dec. T., 1855.

An order of the court allowing an appeal is in effect an order to send the transcript of the record to the appellate court and the clerk's authority for making the return. This order cannot legally be given until the security is approved. *Ib.* 539.

The security must be given within the time prescribed to obtain a *supersedeas* and be sufficient to cover the full amount decreed against the appellant; unless he desires to carry up the case without *supersedeas*, when the security need be only to cover the costs that may be recovered against him in the Supreme Court. *Ib.* 539.

Where an appeal is taken in open court, a memorandum entry of the fact in the minutes or order book is not necessary to give it validity; the party is exercising a legal right, and the clerk's certificate of the fact is sufficient. *Ib.* 537.

Whenever security for an appeal is accepted during a term an appeal is allowed. Until the security has been accepted, allowance of an appeal cannot be said to have been perfected. *Sage v. Central Railroad*, 96 *U. S.* 712-715, 24 *L. ed.* 643, Oct. T., 1877; (modified by *Peugh v. Davis*, 110 *U. S.* 227, holding an appeal in term may be allowed before security given).

The refusal of the Circuit (District) Court to accept a *supersedeas* bond when offered during the term does not prevent a judge of that court or a justice of the Supreme Court from accepting one thereafter. *Ib.* 715.

If the security is given and accepted in open court during the term at which the decree appealed from is rendered, no citation is necessary. *Ib.* 715.

Even though an appeal is asked for in open court, if the security is not taken until after the term, a citation should be issued to bring in the parties. *Ib.* 715.

Congress has not provided for the furnishing of security for the damages which might be recovered in an action for *mesne* profits, when a writ of error is taken from a judgment in ejectment, on which nominal damages only are awarded. The Supreme Court cannot award damages except as authorized by secs. 23, 24 of the Judiciary Act of 1789, which does not cover cases of apprehended losses except when they are part of the original suit. *Roberts v. Cooper*, 19 *How.* 373-374, 15 *L. ed.* 687, Dec. T., 1856.

A bond which contains no security for costs is insufficient in form either for an appeal or a *supersedeas*. *Seward v. Comeau*, 102 U. S. 161, 26 L. ed. 86, Oct. T., 1880.

That the bond is not sufficient in form does not avoid the appeal, but the court may impose terms for the omission. *Ib.*

The question of the sufficiency of the security to operate as a *supersedeas* must be determined in the first instance by the judge who signs the citation; but after the allowance of the appeal this question, as well as every other in the cause, becomes cognizable in the Supreme Court. *Rubber Co. v. Goodyear*, 6 Wall. 153-157, 18 L. ed. 763, Dec. T., 1867.

The power of a judge of the court below over an appeal and security in the absence of fraud is exhausted when he takes the security and signs the citation. From that time the control of the *supersedeas* as well as the appeal is transferred to the Supreme Court, and the court below is without power to proceed with the execution of the decree appealed from. *Draper v. Davis*, 102 U. S. 370-371, 26 L. ed. 122, Oct. T., 1880.

After the acceptance of the bond for an appeal and the docketing of the cause in the Supreme Court the jurisdiction of the court below is gone, and it has no power to make an order vacating its allowance of an appeal. *Keyser v. Farr*, 105 U. S. 265-266, 26 L. ed. 1026, Oct. T., 1881.

Without departing from the rule announced in *Jerome v. McCarter*, 21 Wall. 17, the Supreme Court declares that fraud is always open to inquiry and the court will have no hesitation in setting aside a *supersedeas* bond obtained by misrepresentation amounting to fraud and perjury. *Railroad Co. v. Schutte*, 100 U. S. 644-647, 25 L. ed. 605, Oct. T., 1879.

In this case the court exercising its discretion, refused to accept a new bond in the place of the *supersedeas* bond vacated. *Ib.* 647.

NOTE. Where as in *Bigler v. Waller*, 12 Wall. 142, the court states that security must be given within ten days to operate as a *supersedeas* it must be remembered that these decisions were made before the amendment of sec. 23 of the Act of 1789, by the Act of June 1, 1872, 17 Stat. L. 198, sec. 11. Sec. 1007, *Rev. Stats.*, U. S. *Comp. Stats.* 1901, vol. 1, p. 714.

Prior to the adoption of Rule 29 the amount of the bond given on appeals or writs of error was required to be the amount of the decree or judgment. There was no discretion to be exercised by the judge taking the bond where the appeal or writ of error operated as a *super-*

sedes. Jerome v. McCarter, 21 Wall. 17-27, 22 L. ed. 516, Oct. T., 1874.

Rule 29 is in harmony with the Act of 1789 by which the security to be taken is left to the discretion of the judge or justice accepting it. The rule being for the better adaptation of the practice to the protection of the rights of the litigants. *Ib.* 28.

Upon the facts existing at the time the security is accepted, the action of the judge or justice within the statute and rule is final, and cannot be controlled by the appellate court upon motion. *Ib.* 30.

If, after the security has been accepted, the circumstances of the case or of the parties or of the sureties upon the bond have changed, so that the security which, at the time it was taken was "good and sufficient," does not continue to be so, the Supreme Court may, upon proper application, make an order as justice may require. *Ib.* 31.

On an appeal from a decree for the foreclosure of a mortgage the appeal bond is not intended for a security for either the amount of the decree, or the interest accruing pending the appeal, but for such damages as may arise from the delay incident to the appeal. *Ib.*

Under Rule 29 in suits on mortgages the damages upon appeal to be answered for are only such as are incident to delay in the sale of the property. Supervisor v. Kennicutt, 103 U. S. 554-557, 26 L. ed. 488, Oct. T., 1880.

An appeal bond in an ordinary foreclosure suit in the courts of the United States does not operate as security for the amount of the original decree; nor the interest accruing thereon pending the appeal; nor for the balance due after applying the proceeds of the mortgaged premises; nor for the rents and profits or use and detention of the property pending the appeal; but only for the costs of the appeal; and the deterioration or waste of the property, and perhaps burdens accruing upon it for the non-payment of taxes, and loss by fire if not properly insured. It is very doubtful whether mere depreciation in market value is any cause of recovery on the bond. Kountze v. Omaha Hotel Co., 107 U. S. 378-395, 27 L. ed. 615, Oct. T., 1882.

Justices Miller and Field who participated in framing Rule 29 dissent, holding liability on the bond for "use and detention" pending the appeal. *Ib.* 398.

Where the appeal bond requires the plaintiff shall pay for the "use and detention" of mortgaged property during the appeal these words will be rejected and the bond construed as having the legal effect required by the statute. The judge taking the bond having no right to require such an addition to the appeal and *supersedeas* fixed by law. *Ib.* 396.

When it is desired to make the appeal a *supersedeas* the bond must be filed within ten days (now 60 days, sec. 1007, Rev. Stats., U. S.

Comp. Stats. 1901, p. 714), from the rendering of the decree. The question of the sufficiency of the bond must be determined by the judge who signs the citation, but after the appeal is allowed that question, as well as every other, becomes cognizable in the appellate court, and that court may, in the exercise of its appellate jurisdiction, increase or diminish the bond, or require additional security as justice may require. *French v. Schoemaker*, 12 *Wall.* 86-99, 20 L. ed. 271, Dec. T., 1870.

In order that a writ of error may operate as a *supersedeas* it is necessary that a copy of the writ be lodged for the adverse party in the clerk's office where the record remains, and that the bond approved by the judge allowing the writ should also be filed there. *Commissioners v. Gorman*, 19 *Wall.* 661-662, 22 L. ed. 227, Oct. T., 1873.

If the writ of error and bond are filed before the expiration of ten days, no execution can issue so long as the case in error remains undisposed of. *Ib.* 662.

While under the Act of June 1, 1872 (17 *Stat. L.* 196), sec. 11, a *supersedeas* may be obtained within sixty days from time of the entry of the judgment as a matter of right upon filing the bond, yet if the writ and bond are not filed within ten days, such *supersedeas* stays only proceedings after filing the bond. It prevents further proceeding under an execution which has been issued, but does not interfere with what has already been done. *Ib.* 662.

The ten days during which execution may not issue begins to run from date of entry of the judgment and not from the date when signed. *Ib.* 665.

NOTE. After the decisions in 19 *Wall.* 419, and *Ib.* 661, the Revised Statutes were adopted. As originally adopted no execution could issue without leave where the writ of error might be a *supersedeas* until the sixty days allowed for perfecting an appeal had expired; but by the Act of Feb. 18, 1875 (18 *Stat. L.* 318), Congress amended the section limiting the time for withholding execution to ten days.

The issuance of the writ of error must precede the execution of the bond, but it may be served at any time before or simultaneously with the filing of the *supersedeas* bond (which since the Act of June 1, 1872, sec. 1007, *Rev. Stats.*, *U. S. Comp. Stats.* 1901, p. 714, may be executed within sixty days after the rendition of the judgment). *Telegraph Co. v. Eyser*, 19 *Wall.* 419-428, 22 L. ed. 44, Oct. T., 1873.

The giving of the bond is made the condition of the stay. *Ib.* 428.

Where the security is given within 60 days a *supersedeas* follows as a matter of right. *Ib.* 428.

The service of the writ of error or the perfection of an appeal within sixty days, Sundays exclusive, after the rendition of the judgment

complained of is an indispensable prerequisite of a *supersedeas*, and it is not within the power of a justice or judge of the appellate court to grant a stay of process on the judgment or decree if this has not been done. *Kitchen v. Randolph*, 93 U. S. 86-92, 23 L. ed. 812, Oct. T., 1876.

If a writ of error has been served within the time required, a stay may be had as a matter of right by giving the required security within sixty days, and afterwards as a matter of favor if permission be obtained from the designated judge or justice. *Ib.* 92.

A writ of error operates as a *supersedeas* only from the time of lodging the writ in the office of the clerk where the record to be re-examined remains. *Ib.* 88.

By sec. 1012, *Rev. Stats. (U. S. Comp. Stats., 1901, vol. 1, p. 716)*, appeals are placed on the same footing as writs of error. *Ib.*

By the adoption of sec. 1007, *Rev. Stats. (U. S. Comp. Stats. 1901, vol. 1, p. 714)*, Congress changed the law as it existed when the opinion was rendered in *Telegraph Co. v. Eyser*, and allowed a *supersedeas* only where the writ of error was served within 60 days after the rendition of the judgment. *Ib.* 92.

History of the statutes allowing *supersedeas* prior to the Revised Statutes of 1873 stated. *Ib.* 87.

The rule established in *Sage v. Central Rd.*, 96 U. S. 712, 24 L. ed. 643 (here, pp. 163 and 168); *Kitchen v. Randolph*, 93 U. S. 92, 23 L. ed. 810 (p. 167), is that to give a justice or judge of the appellate court authority to grant a *supersedeas* after the expiration of the sixty days, a writ of error must have been issued or an appeal allowed within that time. *Peugh v. Davis*, 110 U. S. 227-228, 28 L. ed. 128, Oct. T., 1883.

A prayer for an appeal made in open court and an order allowing it constitute a valid appeal. The bond is not essential to the taking of the appeal though it may be to its prosecution, and the Supreme Court has permitted the appellant to give a bond in that court. *Ib.* 228.

If an appeal is allowed by the court in term time without taking a bond within sixty days after rendition of the decree, a justice or judge of the appellate court, may, in his discretion, grant a *supersedeas* after the expiration of that time under sec. 1007, *Rev. Stats. (U. S. Comp. Stats. 1901, vol. 1, p. 714)*. *Ib.* 229.

A *supersedeas* is not obtained by virtue of any process issued by the Supreme Court. It follows as a matter of law, on compliance with the provisions of the Act of Congress, and the court is not required to issue any writ to perfect the right of a party to that which the law has given him. *Goddard v. Ordway*, 94 U. S. 672-673, 24 L. ed. 238, Oct. T., 1875.

If the court below through mistake or otherwise is proceeding to execute its judgment or decree notwithstanding a *supersedeas*, the Supreme Court may issue a writ to restrain that action, in the exercise of their power under sec. 716, *Rev. Stats. (U. S. Comp. Stats. 1901, p. 580)*,

the form of the writ depending on the particular circumstances of the case. *Ib.* 673.

Power to issue a *supersedeas* to a judgment rendered in a subordinate court does not exist in the Supreme Court, where the writ of error is not sued out and served within ten (now sixty) days from the date of the judgment. *Slaughter House Cases*, 10 *Wall.* 273-291, 19 L. ed. 920, Dec. T., 1869.

An exception to the rule has been made where the delay is the fault of the court and not of the party and where the granting of such writ is necessary to appellate jurisdiction because the subordinate court has improperly rejected a proper bond offered in due time. *Ib.* 291.

A further exception arises where the judgment or decree of the highest court of a State is required to be returned to the subordinate court for execution. In such cases the writ of error granted by the Supreme Court may operate as a *supersedeas* if granted and served within ten (now sixty) days from the return entry of the proceedings in the court from which the record was removed. *Ib.* 291.

Where the prescribed conditions are complied with appeals and writs of error become *supersedeas* by virtue of the Act of Congress, and not by virtue of any process. *Ib.* 291.

Where the writ of error is seasonably sued out and served and a return thereon made and the record filed, the Supreme Court may grant a *supersedeas* before the return-day of the writ. *Ib.* 292.

Jurisdiction attaches in the appellate court to issue a *supersedeas* from the time of compliance with the conditions prescribed by Congress to make the writ of error operate as a stay of execution, but only in cases of urgent necessity will the court exercise its power before the return-day of the writ of error. *Ib.* 292.

Where a writ of error was sued out and a bond given within the time prescribed by law to operate as a *supersedeas*, but no copy of the writ of error was lodged in the clerk's office within the prescribed time, *Held*, the court could not dispense with a compliance with the statute then in force; that by the issuing and due service of the writ, the cause was removed from the inferior court, but to operate as a *supersedeas* the law must be complied with. *Railroad Co. v. Harris*, 7 *Wall.* 574-575, 19 L. ed. 101, Dec. T., 1868.

Supersedeas is a statutory remedy. Neither the court nor judges can disregard the requirements of the statute. If a delay beyond the limited time occurs, the right to the remedy is gone and the successful party holds the judgment or decree freed and discharged from this means of staying proceedings for its enforcement. *Sage v. Central R. R. Co.*, 93 *U. S.* 412-417, 23 L. ed. 935, Oct. T., 1876.

To make a *nunc pro tunc* order effectual for the purposes of a *supersedeas* it must appear that the delay was the act of the court and not of the parties, and that injustice will not be done. *Ib.* 417.

The rights of the parties in respect to appeal are determined by the date of the actual entry, or the signing and filing of the final decree. *Rubber Co. v. Goodyear*, 6 *Wall.* 153-156, 18 L. ed. 763, Dec. T., 1867.

If the bond has not been furnished and accepted before the cause has been docketed in the Supreme Court, that court before dismissing the appeal will give leave to supply the omission. *Dodge v. Knowles*, 114 *U. S.* 436-438, 29 L. ed. 297, Oct. T., 1884.

Where execution of the whole decree was stayed by another decree at the time the security was given, after such appeal has been dismissed the *supersedeas* may be modified. *Williams v. Clafin*, 103 *U. S.* 753, 26 L. ed. 606, Oct. T., 1880.

When a writ of error operating as a *supersedeas* has been dismissed, and a second writ of error is sued out after the time limited by sec. 23 of the Judiciary Act of 1789 to operate as a *supersedeas*, the Supreme Court is not authorized to award a *supersedeas* to stay proceedings in the lower court. *Hogan v. Ross*, 11 *How.* 294-297, 13 L. ed. 703, Dec. T., 1850.

The form of an appeal bond that the appellants "shall duly prosecute their said appeal with effect and moreover pay the amount of costs and damages rendered and to be rendered in case the decree shall be affirmed," is correct, and in legal effect conforms to the requirement of sec. 1000, *Rev. Stats.* (*U. S. Comp. Stats.* 1901, p. 712). *Gay v. Part*, 101 *U. S.* 391, 25 L. ed. 841, Oct. T., 1879.

If the decree is not substantially reversed, it is affirmed and the appeal has not been prosecuted with effect. *Ib.* 392.

The bond should be given to the opposite party or parties in the suit, but, if irregular in this respect, it is the constant practice to allow such defects to be obviated by granting leave to file a new bond within a reasonable time to be fixed by the court upon application (if the statute has otherwise been complied with). *Bigler v. Waller*, 12 *Wall.* 142-149, 20 L. ed. 262, Dec. T., 1870.

If a *supersedeas* is not desired, the bond is only for costs including "just damages for delay." *Ib.* 149.

Though by the form of the bond the sureties are not jointly bound, it being within the discretion of the judge to accept such a bond, his action is not reviewable by the Supreme Court. *Insurance Co. v. Albro Co.*, 112 *U. S.* 506-507, 28 L. ed. 809, Oct. T., 1884.

Sureties upon the bond are not required to be residents of the district where the bond is given. In a case where a proper bond was refused because the sureties were non-residents, the court held it doubt-

ful if it might interfere by mandamus, but as the cause had been removed into the Supreme Court (within the time prescribed by sec. 1007, *Rev. Stats., U. S. Comp. Stats.* 1901, p. 714), it could issue a *supersedeas* upon filing a bond in that court, and that such power was given by sec. 14 of the Judiciary Act, to render its appellate jurisdiction effectual. *Ex parte Milwaukee, etc., Co.*, 5 *Wall.* 188-190, 18 L. ed. 676, Dec. T., 1866.

Where the writ of error was seasonably taken and security given, and citation served so as to operate as a stay of execution and thereafter a *fiery facias* was improperly sued out in the court below; on motion to quash the writ of *fiery facias* in the Supreme Court, that court issued a *supersedeas* to suspend and quash the execution in the court below, remarking that it might have been quashed by application to that court, but it was equally competent for the Supreme Court to act. *Stockton v. Bishop*, 2 *How.* 74-75, 11 L. ed. 185, Jan. T., 1844.

NOTE. The order from the Supreme Court to the Circuit Court is printed at length.

The object of Rule 29 is to secure the eventual payment or performance of the judgment or decree, the execution of which is stayed by the *supersedeas*, in case the appeal or writ of error is not prosecuted to effect.

The rule is satisfied if the indemnity is commensurate with the damages that may follow from the stay which is effected. *Ex parte French*, 100 *U. S.* 1-4, 25 L. ed. 530, Oct. T., 1879.

Where a judgment runs against several defendants for separate amounts and all the defendants want the judgment reviewed but a part only desire to have execution stayed, all may join in a writ of error and separate when they ask for a stay. *Ib.* 5.

It is not necessary in order to charge the sureties in an appeal bond that an execution on the judgment affirmed in the appellate court should be issued against the principal. All the obligors are principal debtors to the obligee, and if the judgment is affirmed the sureties become liable to the same extent as the principal obligor. *Babbitt v. Finn*, 101 *U. S.* 7-14, 25 L. ed. 822, Oct. T., 1879.

Sec. 1007, *Rev. Stats.*, (*U. S. Comp. Stats.* 1901, p. 714), to the effect that in cases where a writ of error may be a *supersedeas*, executions shall not issue until the expiration of ten days, does not apply to judgments of the highest court of a State. *Doyle v. Wisconsin*, 94 *U. S.* 50-52, 24 L. ed. 65, Oct. T., 1876.

It was not the intention of Congress to interfere at all with the practice of the State courts, as to executions upon their judgments until a *supersedeas* is actually perfected. *Ib.* 52.

The provision of sec. 16 of the act to regulate commerce as amended by the Act of Mar. 2, 1889 (25 *Stat. L.* 855), that appeals from the Circuit Courts should not operate to stay the Circuit (District) Court's order do not prevent an appeal from a decree of the Circuit Court of Appeals, from operating as a *supersedeas* upon its allowance, with approval of security within the prescribed time. *Louisville & N. R. Co. v. Behlmer*, 160 *U. S.* 644-647, 42 L. ed. 890, Oct. T., 1897.

RULE XXX—*Rehearing*

A petition for rehearing after judgment can be presented only at the term at which judgment is entered, unless by special leave granted during the term; and must be printed and briefly and distinctly state its grounds, and be supported by certificate of counsel; and will not be granted, or permitted to be argued, unless a justice who concurred in the judgment desires it, and a majority of the court so determines.

Petitions for rehearing to be printed, supported by certificate and presented at term judgment rendered.

Promulgated Jan. 7, 1884, 108 *U. S.* 591; promulgated December 22, 1911, 222 *U. S.*

Decisions

After a mandate no rehearing will be granted, and on a subsequent appeal nothing is brought up but the proceedings subsequent to the mandate. *Sibbald v. United States*, 12 *Pet.* 488-492, 9 L. ed. 1169, Jan. T., 1838.

Except in cases of fraud rehearings are never granted when the final decree has been entered and the mandate sent down, unless the application is made at the same term.

Appellate courts have no power to review their own decision. *Noonan v. Bradley*, 12 *Wall.* 121-129, 20 L. ed. 281, Dec. T., 1870.

Cases cited where the rule has been enforced. *Bushnell v. Crooke M. & S. Co.*, 150 *U. S.* 82, 37 L. ed. 1007, Oct. T., 1893.

After the end of the term the court may do no more than correct any clerical errors that may be found in the record. It has no power to call back parties then discharged. *Brooks v. Railroad Co.*, 102 *U. S.* 107, 26 L. ed. 92, Oct. T., 1880.

Where in the printing of the record there was by accident omitted the return to the citation by which it appeared that the citation was never served, a decree rendered at one term in a cause heard, without appearance of appellee on motion at the next term to set aside and

annul the decree, was held to be within the power of the court to reach, which it did by declaring its decree rendered null and void and revoking its mandate theretofore sent to the court below. The decree and mandate are set out in the cause. *Ex parte Anderson Crenshaw*, 15 *Pet.* 119-124, 10 L. ed. 684, Jan. T., 1841.

Where a cause was dismissed because the record contained no evidence of the jurisdiction of the trial court, but the fact was overlooked that the suit was ancillary to an ejectment suit in the same court below on the law side the decree of dismissal was set aside and the cause reinstated. *Johnson v. Christian*, 125 *U. S.* 642, 31 L. ed. 820.

Where a cause has been dismissed upon a mistaken assumption of fact, the judgment of dismissal will be set aside and an application for rehearing will be granted. *Security Mut. Life Ins. Co. v. Prewitt*, 202 *U. S.* 246-248, 50 L. ed. 1014.

No rehearing will be granted unless some member of the court who concurred in the judgment expresses a desire for it, and not then unless the proposition receives the support of a majority of the court. *Ambler v. Whipple*, 23 *Wall.* 278-280, 23 L. ed. 127, Oct. T., 1874.

No reargument will be granted unless a member of the court who concurred in the judgment desires it, and when that is the case, the court of its own accord will apprise counsel of its wishes and designate the points on which it desires to hear them. *Brown v. Aspden*, 14 *How.* 25-27, 14 L. ed. 312, Dec. T., 1852.

Early practice of Supreme Court compared with practice of the English Chancery Courts. *Ib.*

That the decree is affirmed by a divided court is no reason for ordering a re-argument before a full bench. *Ib.*

Where the court does not of its own motion order a rehearing it will be proper for counsel to submit without argument a short written or printed petition, or suggestion of the important points, and upon such submission if any judge who concurred in the decision thinks proper to move for a rehearing the motion will be considered. *Public Schools v. Walker*, 9 *Wall.* 603-604, 19 L. ed. 650, Dec. T., 1869.

A motion for a rehearing is one addressed to the discretion of the court. Necessary jurisdictional allegations cannot properly be introduced for the first time on a motion for a rehearing. *Steines v. Franklin County*, 14 *Wall.* 15-21, 20 L. ed. 848, Dec. T., 1871.

Decisions of State courts granting or refusing a motion for a rehearing in an equity suit are not re-examinable in the Supreme Court. *Ib.* 21.

An application to consider new evidence in a subsequent suit upon a different cause of action the result of which consideration would be to make a finding in the second suit different from the former finding is in effect to seek a rehearing of one cause in another suit. Such practice is wholly inadmissible under the rule of *res adjudicata*. *Southern Pacific R. Co. v. United States*, 168 *U. S.* 1-65, 42 L. ed. 382.

RULE XXXI—*Form of Printed Records and Briefs*

All records, arguments, and briefs, printed for the use of the court, must be in such form and size that they can be conveniently bound together, so as to make an ordinary octavo volume; and, as well as all quotations contained therein, and the covers thereof, must be printed in clear type (never smaller than small pica) and on unglazed paper.

Records and briefs, form of and size to make an octavo volume, on unglazed paper, of pica or larger type.

Promulgated Dec. 19, 1879, 100 *U. S.* ix; published in 108 *U. S.* 591; amended October Term, 1899. Amendment promulgated May 14, 1900, 178 *U. S.* 618, 44 L. ed. 1223. Amended March 31, 1911.¹ See Act Feb. 13, 1911, allowing parties to print their records.

Promulgated December 22, 1911, 222 *U. S.*

Decisions

Rule 31 relates only to the form and size of the printed records, briefs, and arguments and has nothing to do with the clerk's fee for printing the record. *Bean v. Patterson*, 110 *U. S.* 401-403, 28 L. ed. 191, Oct. T., 1883.

RULE XXXII—*Writs of Error and Appeals in Cases Involving Jurisdiction of Lower Court*

Cases brought to this court by writ of error or appeal, where the only question in issue is the question of the jurisdiction of the court below, will be advanced on motion, and heard under the rules prescribed by Rule 6, in regard to motions to dismiss writs of error and appeals.

Cases certified on question of jurisdiction advanced on motion.

A similar rule for causes brought up under sec. 5 of the Act of Mar. 3, 1875, was promulgated Jan. 16, 1882, as Rule 32, 104 *U. S.* ix; published in 108 *U. S.* 591; amended Mar. 10, 1890, 133 *U. S.* 711; again amended Nov. 28, 1892, 146 *U. S.* 707; amended Dec. 22, 1911, 222 *U. S.*

¹ It is ordered by the court that the provisions of Rule 31 of this court shall apply to all records to be printed as provided in the Act of Congress entitled "an act to diminish the expense of proceedings on appeal and writ of error or of certiorari," approved Feb. 13, 1911.

Decisions

Cases advanced under Rule 32 are submitted like motions to dismiss under Rule 6; on printed briefs after service of notice and brief as required by Rule 6, sec. 4. *Fletcher v. Hamlet*, 116 *U. S.* 408-409, 29 L. ed. 679, Oct. T., 1885.

Motions under this rule should be accompanied by an agreed statement of the case or by such extracts from the record as will show that the case is one to which the rule is applicable. *Call v. Palmer*, 106 *U. S.* 39, 27 L. ed. 61, Oct. T., 1882.

A writ of error to a State court which affirmed a judgment of a trial court refusing to yield its jurisdiction on a petition for removal, *Held*, within the spirit of Rule 32 and may be advanced and heard under the rules prescribed by Rule 6 in regard to motions to dismiss. *Burlington, C. R. & N. Ry. Co. v. Dann*, 121 *U. S.* 182, 30 L. ed. 885, Oct. T., 1886.

Where the case is disposed of on motion to dismiss (under Rule 6), an order to advance on motion of appellants under Rule 32 will not be made. *Aspen M. & S. Co. v. Billings*, 150 *U. S.* 31-34, 37 L. ed. 987, Oct. T., 1893.

It is plain that it was the intent of Congress that a party whose suit has been dismissed by a Circuit (District) Court for want of jurisdiction shall have the right to have such judgment reviewed by the Supreme Court. *Wetmore v. Rymer*, 169 *U. S.* 115-118, 42 L. ed. 683, Oct. T., 1897.

The opinion refers to the Act of Mar. 3, 1875 (18 *Stat. L.* 472); the Act of Aug. 13, 1888 (25 *Stat. L.* 433), repealing the last paragraph of sec. 5 of the Act of Mar. 3, 1875; the Act of Feb. 25, 1889 (25 *Stat. L.* 693), and the Act of Mar. 3, 1891, and in a cause where the Circuit Court dismissed the suit as not within the jurisdictional amount, reviewed the judgment on a writ of error to the Circuit Court, and stated that as prescribed by sec. 5 of the Act of Mar. 3, 1891, the question of the jurisdiction of the Circuit Court was alone presented for decision. *Ib.* 118-119.

The question of the value of the property in dispute and whether it is of a value sufficient to give the Circuit (District) Court jurisdiction is purely one of fact; yet if that question is determined by the court without a jury upon affidavits, upon a writ of error, the Supreme Court is not restricted to errors of law shown by the record, but may review the question of fact and determine upon the evidence in the record whether the dismissal for want of jurisdiction was warranted. *Ib.* 119-123.

Where the question of the jurisdiction of the Circuit (District) Court is raised, either by the defendant or by the court on its own motion, the

court may order the issue tried by the jury, or himself hear and determine it; but if the court determines the question, its action must be in a form that will enable the Supreme Court to review its judgment, so far as to determine whether the conclusion of the court was warranted by the evidence. *Ib.* 120-122.

Prior to the Act of Mar. 3, 1875, questions going to the jurisdiction of the court could only be raised by a plea in abatement in the nature of a plea to the jurisdiction, and whether the plea presented questions of law or questions of fact when presented for review by an agreed statement of facts or upon exceptions to the ruling of the trial court, only questions of law were reviewable on writ of error. *Ib.* 119.

In order to bring a case within Clause 3 of sec. 5 of the Act of Mar. 3, 1891, which allowed a direct appeal to the Supreme Court "in any case which involves the construction or application of the Constitution of the United States," the Circuit Court must have construed the Constitution or applied it to the case, or have been requested, and have declined or omitted, to construe or apply it. *Cornell v. Green*, 163 *U. S.* 75-78, 41 *L. ed.* 77, Oct. T., 1895.

The Act of Feb. 25, 1889, gave the Supreme Court jurisdiction without regard to the amount involved to review final judgments in the Circuit Courts of the United States in which a question of the jurisdiction of the lower court was involved, but where the decree or judgment did not exceed the sum of five thousand dollars, its review was confined to the question of jurisdiction; *Held*, that although the record failed to show that the question of jurisdiction was raised in the court below by any plea or motion, yet as the record failed affirmatively to show jurisdiction the Supreme Court was bound to take notice of the defect. *Mattingly v. The Northwestern, etc., Co.*, 158 *U. S.* 53-57, 39 *L. ed.* 895.

The fifth section of the Act of Mar. 3, 1891, did not authorize a direct appeal to the Supreme Court in a suit involving the jurisdiction of the Circuit Court over another suit previously determined in that court. *Carey v. Houston & T. C. R. Co.*, 150 *U. S.* 170-180, 37 *L. ed.* 1044, Oct. T., 1893.

If both a question of jurisdiction and other questions were before the court below and a writ of error is allowed in the usual and general form to review its judgment, without defining or indicating any specific question of jurisdiction, the Supreme Court could not take jurisdiction under the first paragraph of sec. 5 of the Act of Mar. 3, 1891 (sec. 238, Judicial Code), as there was no such clear, full and separate statement of a definite question of jurisdiction as would supply the want of a formal certificate under the first clause of that act. *Chappell v. United States*, 160 *U. S.* 499-508, 40 *L. ed.* 513, Oct. T., 1895.

Held, when the rule applied to writs of error and appeals under sec. 5 of the Act of Mar. 3, 1875, that it was to be invoked only upon writs of error and appeals from orders of the Circuit Courts remanding causes which has been removed from State courts, and from orders dismissing suits because they did not really and substantially involve controversies within the jurisdiction of the Circuit Courts, or because the parties had been improperly made or joined, for the purpose of creating a case cognizable under that act. *Poindexter v. Greenhow*, 109 U. S. 63-64, 27 L. ed. 861, Oct. T., 1883.

If when the Circuit (District) Court dismisses a cause because the necessary diversity of citizenship is not affirmatively shown on the record, the plaintiff in the court below takes the case to the Court of Appeals, its decision will be final. *Benjamin v. New Orleans*, 169 U. S. 161-164, 42 L. ed. 702, Oct. T., 1897.

An erroneous conclusion of a District Court upon a contention addressed to the merits, of a charge for contempt of court, where jurisdiction over the person and subject-matter was obtained, could not be reviewed by the Supreme Court on a certificate under sec. 5, Clause 1 of the Act of Mar. 3, 1891 (sec. 238, Judicial Code). *O'Neal v. United States*, 190 U. S. 36-38, 47 L. ed. 946, Oct. T., 1902.

A contempt proceeding in effect a criminal case is not reviewable by the Supreme Court on appeal or error (but may only be reached by certiorari). *Ib.* 38.

In a case where the jurisdiction of the District Court is in issue a certificate by that court presenting such question for determination to the Supreme Court is required, and the absence of such certificate is fatal. *Maynard v. Hecht*, 151 U. S. 324-328, 38 L. ed. 181, Oct. T., 1893.

The absence of such certificate cannot be helped out by resort to a petition for the writ of error, nor to an assignment of errors, though each of them raises the question of jurisdiction, as the certificate was made an absolute prerequisite by sec. 5 of the Act of Mar. 3, 1891 (now sec. 238, Judicial Code). *Ib.* 328.

Where the bill in the District Court makes a case within either of the three last clauses of sec. 5 of the Act of Mar. 3, 1891 (sec. 238, Judicial Code), a certificate of the circuit judge raising only the question of the jurisdiction of that court as a court of the United States cannot narrow the jurisdiction of the Supreme Court to review the whole case, and such certificate is unnecessary. *Giles v. Harris*, 189 U. S. 475-486, 47 L. ed. 912, Oct. T., 1902.

If the writ of error is allowed upon the petition of the original plaintiff asking for a review of a judgment dismissing the action for want of

jurisdiction, and the only question tried and decided by the court below was a question of jurisdiction (in this case overruling a demurrer to a plea to the jurisdiction), that question is sufficiently certified where the petition for the writ of error asked only for a review of the question of jurisdiction. *Interior Construction Co. v. Gibney*, 160 U. S. 217-219, 40 L. ed. 401, Oct. T., 1895.

Where the jurisdiction of the court below is in issue and the case is certified to the Supreme Court, the certificate must be granted during the term at which the judgment or the decree is entered. *Colvin v. Jacksonville*, 158 U. S. 456-457, 39 L. ed. 1053, Oct. T., 1894.

In the disposition of the case the court is confined to the certificate. *Ib.* 459.

The certificate set out in full in the case. *Ib.*

A direct appeal to the Supreme Court from the District Court will not lie on an issue as to the jurisdiction of the court below unless the question of jurisdiction is certified during the term at which the final decree is rendered. *Merritt v. President, etc.*, 167 U. S. 745, 42 L. ed. 1209, Oct. T., 1897.

If the jurisdictional question is not certified during the term the defect cannot be remedied by granting leave to remand the cause for correction of the record by the addition of a certificate. *The Bayonne*, 159 U. S. 687-693, 40 L. ed. 309, Oct. T., 1895.

The allowance of an appeal upon the ground that the trial court was without jurisdiction to make the decree without specifying the question of jurisdiction, and otherwise proceeding as if the appeal were on the whole case, cannot be treated as the certificate required by sec. 5 of the Act of Mar. 3, 1891 (sec. 238, Judicial Code). *Ib.* 693.

As the parties are out of court at the close of the term at which the final judgment or decree is entered and the litigation there is at an end, the trial court has no power to grant a certificate upon the question of jurisdiction thereafter, and cannot certify *nunc pro tunc*, if no such certificate was made or intended to be made during the term. *Re Lehigh Mining & Mfg. Co.*, 156 U. S. 322-327, 39 L. ed. 440, Oct. T., 1894.

Where the judgment recites that the cause was dismissed for want of jurisdiction and in the order allowing the writ of error, that it was allowed upon the question of jurisdiction, and the bill of exceptions as certified presents the question of jurisdiction as the only question involved, it will be a sufficient certification. *Ib.* 327.

If objection to the jurisdiction is made and jurisdiction sustained the defendant may preserve the question by a certificate in the form of a bill of exceptions, and if the final judgment is against him, may at the

proper time bring the case directly to the Supreme Court on the question of jurisdiction. *Ib.* 328.

It is not necessary that the word "certify" shall be formally used; but no mere suggestion that the jurisdiction of the court was in issue will answer. The record must affirmatively show that the trial court sent up for consideration the single definite question of jurisdiction. *Shields v. Coleman*, 157 U. S. 168-176, 39 L. ed. 663, Oct. T., 1894.

It is sufficient that there shall be a plain declaration that the single matter which is by the record sent up to the Supreme Court for decision is a question of jurisdiction, and the precise question clearly, fully, and separately stated. *Ib.* 177. The petition and order are set out in the case.

Where after the evidence was closed the court declined to submit the case and entered an order that "it appearing that this court has not jurisdiction of the subject-matter of this action it is ordered that this case be and the same is hereby dismissed," upon which judgment a writ of error was sued out, *Held*, that as the Circuit Court had made no certificate of the question of its jurisdiction the judgment could not be reviewed, and the writ of error was dismissed. *Davis v. Rankin*, 162 U. S. 290-291, 40 L. ed. 973, Oct. T., 1895.

Where the contention is that a District Court of the United States never acquired jurisdiction over the defendant by a valid service of process, as in such case there would be an entire want of jurisdiction, any judgment rendered therein can be reviewed by the Supreme Court on a writ of error directly sued out to that court. *Sheppard v. Adams*, 168 U. S. 618-623, 42 L. ed. 603, Oct. T., 1897.

NOTE. The case of *Smith v. McKay*, 161 U. S. 355, 40 L. ed. 731, distinguished.

The Act of Mar. 3, 1891, nowhere imposed a pecuniary limit upon the appellate jurisdiction of the Supreme Court or the Circuit Court of Appeals from a District Court of the United States. *The Paquette Habana*, 175 U. S. 677, 683, 44 L. ed. 322, Oct. T., 1899.

RULE XXXIII—*Models, Diagrams, and Exhibits of Material*

1. Models, diagrams, and exhibits of material forming part of the evidence taken in the court below, in any case pending in this court, on writ of error or appeal, shall be placed in the custody of the marshal of this court at least one month before the case is heard or submitted.

Models, etc., furnished one month in advance of hearing.

2. All models, diagrams, and exhibits of material, placed in the custody of the marshal for the inspection of the court on the hearing of a Removed by the parties after hearing case, must be taken away by the parties within one month after the case is decided. When this is not done, it shall be the duty of the marshal to notify the counsel in the case, by mail or otherwise, of the requirements of this rule; and if the articles are not removed within a reasonable time after the notice is given, he shall destroy them, or make such other disposition of them as to him may seem best.

Promulgated Nov. 13, 1882, 106 U. S. vii; published in 108 U. S. 592; amended October Term, 1885, 115 U. S. 701.

Promulgated December 22, 1911, 222 U. S.

RULE XXXIV—*Custody of Prisoners on Habeas Corpus*

1. Pending an appeal from the final decision of any court or judge declining to grant the writ of habeas corpus, the custody of the prisoner On habeas corpus, the custody of prisoner not disturbed by an appeal. shall not be disturbed.

2. Pending an appeal from the final decision of any court or judge discharging the writ after it has been issued, the prisoner shall be remanded to the custody from which he When the writ is discharged, the prisoner remanded to custody from which taken. was taken by the writ, or shall, for good cause shown, be detained in custody of the court or judge, or be enlarged upon recognizance as hereinafter provided.

3. Pending an appeal from the final decision of any court or judge discharging the prisoner, he shall be enlarged upon recognizance, with Pending an appeal from order of discharge, prisoner enlarged on recognizance. surety, for appearance to answer the judgment of the appellate court, except where, for special reasons, sureties ought not to be required.

Promulgated Mar. 29, 1886; amended May 10, 1886, 117 U. S. 708.

Promulgated Dec. 22, 1911, 222 U. S.

Decisions

The general rules for review in courts of the United States and their practice in *habeas corpus* cases stated. *Whittier v. Tomlinson*, 160 U. S. 231-238, 40 L. ed. 411, Oct. T., 1895.

An order of a District Court in a *habeas corpus* case is reviewable upon appeal and not by writ of error. *Rice v. Ames*, 180 U. S. 371-374, 45 L. ed. 581, Oct. T., 1900.

Sec. 752, *Rev. Stats. (U. S. Comp. Stats. 1901, p. 592)*, gives power to the justices of the Supreme Court and judges of the Circuit and District Courts to grant writs of *habeas corpus*, but sec. 764, *Rev. Stats. (U. S. Comp. Stats. 1901, p. 595)*, as amended by the Act of Mar. 3, 1885, gives an appeal to the Supreme Court in *habeas corpus* cases only from the final decision of a Circuit (District) Court. A decision of a judge sitting as a judge, and not as a court, is not appealable. *Carper v. Fitzgerald*, 121 U. S. 87-89, 30 L. ed. 883, Oct. T., 1886.

An order that the papers and the judge's order thereon be filed and recorded in the Circuit (District) Court does not make the decision of a judge, sitting as judge, a decision of the court. *Ib.* 89.

The purpose of Rule 34 is to regulate proceedings under secs. 863, 864, *Rev. Stats. (U. S. Comp. Stats. 1901, pp. 661, 663)*, made under powers conferred by sec. 765, *Rev. Stats. (U. S. Comp. Stats. 1901, p. 596)*. *Ib.* 89.

Where the record shows that while the original order of discharge was made at chambers and being an order of the circuit judge only would not be appealable, yet the final order discharging the prisoner from custody was the order of the court at a stated term, an appeal therefrom lies. *Harkrader v. Wadley*, 172 U. S. 148-162, 43 L. ed. 404, Oct. T., 1898.

Although the circuit judge, upon dismissal of a petition for a writ of *habeas corpus* for want of jurisdiction, signs a certificate of that fact, upon an appeal from the order, the Supreme Court is not limited to the question of jurisdiction as in ordinary suits, as sec. 761, *Rev. Stats., (U. S. Comp. Stats. 1910, p. 594)*, is applicable to the Supreme Court. *Storti v. Massachusetts*, 183 U. S. 138-143, 46 L. ed. 124, Oct. T., 1901.

Where a prisoner is in custody by virtue of a State statute a writ of *habeas corpus* will not be issued unless such statute is in conflict with the Constitution of the United States. *Andrews v. Swartz*, 156 U. S. 272-275, 39 L. ed. 423, Oct. T., 1894.

Where the applicant for the writ of *habeas corpus* is alleged to be restrained in violation of the Constitution or some law or treaty of the United States, the appeal from a final decision of the District Courts is directly to the Supreme Court. *Craemer v. Washington*, 168 U. S. 124-128, 42 L. ed. 408, Oct. T., 1897.

If the restraint in such case is by any State court or by or under the authority of any State, further proceedings cannot be had against him, pending the appeal. *Ib.* 128.

No order staying proceedings under State authority is made a condition of the stay granted by sec. 766, *Rev. Stats. (U. S. Comp. Stats. 1901, p. 597)*, while proceedings on appeal are being determined; the bare pendency of the appeal has the effect to stay proceedings in the State court. *Lambert v. Barrett*, 159 *U. S.* 660-662, 40 L. ed. 297, Oct. T., 1895.

Appeals from decrees of Circuit Courts in *habeas corpus* cases could not, after the Act of Mar. 3, 1891, be taken directly to the Supreme Court except in the class of cases mentioned in sec. 5 of that act. *Cross v. Burke*, 146 *U. S.* 82-88, 36 L. ed. 899, Oct. T., 1892.

The history of the legislation by Congress upon the subject of *habeas corpus* set forth. *Ib.* 82.

An appeal may be direct to the Supreme Court where the constitutionality of the statute under which the complaint upon which the prisoner is held is founded, is drawn in question; and where an appeal or writ of error was taken direct to the Supreme Court under sec. 5 of the Act of Mar. 3, 1891, in a case where the constitutionality of a law of the United States was drawn in question, that court acquired jurisdiction of the entire case and all questions involved in it. *Horner v. United States*, 143 *U. S.* 570-576, 36 L. ed. 269, Oct. T., 1891.

The Supreme Court cannot review the decisions of the Supreme Court of the District of Columbia on *habeas corpus*. *Cross v. Burke*, 146 *U. S.* 82-88, 36 L. ed. 898, Oct. T., 1892, reversing *Wales v. Whitney*, 114 *U. S.* 564, 29 L. ed. 277, Oct. T., 1884.

A different rule applies as to the review of the final orders of the territorial Supreme Courts on *habeas corpus*, under secs. 702 (1909, *Rev. Stats., U. S. Comp. Stats. 1901, pp. 571, 715*). *Gonzales v. Cunningham*, 164 *U. S.* 612-618, 41 L. ed. 574, Oct. T., 1896.

The Judiciary Act of Mar. 3, 1891, did not do away with the special provision of sec. 1909, *Rev. Stats., (U. S. Comp. Stats., 1901, p. 715)*, allowing appeals from the decisions of territorial courts upon writs of *habeas corpus* involving questions of personal freedom. *Ib.* 619.

That a writ of *habeas corpus* cannot be used to perform the office of a writ of error is applicable as well to appeals from courts below as to original writs. *Ib.* 621.

A proceeding in *habeas corpus* is a civil and not a criminal proceeding and, being only available to assert the civil right of personal liberty, the matter in dispute has no money value. Where the statute allowing an appeal limits the right to causes in which there is a pecuniary matter in dispute an appeal in a *habeas corpus* proceeding will not lie. *Ib.* 618.

A *habeas corpus* case not being one in which the matter in controversy involves a money value, might not be appealed from the Circuit

Court of Appeals under sec. 6 of the Act of Mar. 3, 1891, but was made final in the Court of Appeals and reviewable on certiorari. *Lau Ow Bew v. United States*, 144 U. S. 47-58, 36 L. ed. 345, Oct. T., 1891.

The statement in *Ex parte Chetwood*, 165 U. S. 443-462, 41 L. ed. 788, that judgments in proceedings in contempt are not reviewable on appeal or error to the Supreme Court, was made with reference to independent proceedings for contempt in the Federal courts, being considered criminal proceedings; it does not apply to appeals from the highest court of a State dismissing a writ of *habeas corpus* issued by one of its judges, as against a right specially set up and claimed by a person in custody for contempt, that he is denied his liberty in contravention to the Constitution, laws, or a treaty of the United States. *Tinsley v. Anderson*, 171 U. S. 101-105, 43 L. ed. 96, Oct. T., 1897.

RULE XXXV—Assignment of Errors

1. Where an appeal or a writ of error is taken from a District Court direct to this court, under sec. 238 of the act entitled "An act to codify, revise and amend the laws relating to the judiciary," approved March 3, 1911, chapter 231, the plaintiff in error or appellant shall file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of errors shall have been filed. When the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the assignment of errors shall set out the part referred to *totidem verbis*, whether it be in instructions given or in instructions refused. Such assignment of errors shall form part of the transcript of the record, and be printed with it. When this is not done counsel will not be heard, except at the request of the court; and errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned.

Assignment of error under sec. 238, Act of Mar. 3, 1911, filed with petition for writ of error or appeal.—What to contain.—Forms part of transcript to be printed.—Errors, not assigned, disregarded.

2. The plaintiff in error or appellant shall cause the record

to be printed, according to the provisions of secs. 2, 3, 4, 5, 6 and 9, of Rule 10.

Clause 1 amended December 22, 1911.

Promulgated as original Rule 35, Nov. 3, 1890, 137 *U. S.* 709; amended May 11, 1891, 139 *U. S.* 705, 34 L. ed. 1128.

Promulgated December 22, 1911, 222 *U. S.*

Decisions

Even if a party might be entitled to come directly to the Supreme Court under sec. 5 of the Act of 1891 (sec. 238, Judicial Code), yet if he does not do so, and carries his case to the Court of Appeals, he must abide by the judgment of that court in a case in which such judgment is final. *Carey Mfg. Co. v. Acme Clasp Co.*, 187 *U. S.* 427-428, 47 L. ed. 245, Oct. T., 1902.

When the jurisdiction of the Circuit (District) Court is invoked solely on the ground of diversity of citizenship two classes of cases can arise: one in which the questions set out in sec. 5 of the Act of 1891 (sec. 238, Judicial Code), appear in the course of the proceedings; and one in which other Federal questions appear. Cases of the first class may be taken to the Supreme Court directly, or to the Circuit Court of Appeals, in which case its decision is final. Cases of the second class must be taken to the Court of Appeals and its judgment therein is final. *Ayers v. Polsdorfer*, 187 *U. S.* 585-590, 47 L. ed. 315, Oct. T., 1902.

To determine whether the case was directly appealable under sec. 5 of the Act of Mar. 3, 1891 (sec. 238, Judicial Code), the Supreme Court looked into the record, without regard to any certificate given by the trial judge. *Cosmopolitan Mining Co. v. Walsh*, 193 *U. S.* 460-468, 48 L. ed. 752, Oct. T., 1903.

Held there was nothing in the Act authorizing a certificate as to whether or not a case was of the class, made directly appealable by sec. 5 of the Act of Mar. 3, 1891. *Ib.* 468.

The object of the rule requiring an assignment of errors stated. *Phillips, etc., Co. v. Seymour*, 91 *U. S.* 646-648, 23 L. ed. 342, Oct. T., 1875.

An assignment of errors cannot be availed of to import questions into a cause which the record does not show were raised in the court below and rulings asked thereon, so as to give jurisdiction to the Supreme Court under sec. 5 of the Act of Mar. 3, 1891 (sec. 238, Judicial Code). *Ansboro v. United States*, 159 *U. S.* 695-698, 40 L. ed. 311, Oct. T., 1895.

While an assignment of errors cannot import questions into a cause which the record does not show were raised and passed on in the court

below, the court may refer to such assignment to ascertain the contentions of plaintiff in error. *Missouri P. Ry. Co. v. Fitzgerald*, 160 *U. S.* 556–575, 40 L. ed. 540, Oct. T., 1895.

Where the judgment of the Circuit Court dismissing a suit and the prior proceedings clearly showed on the record that the only matters tried and determined were demurrers to pleas to the jurisdiction, and that the petition upon which a writ of error was allowed asked only for a review of such judgment of dismissal for want of jurisdiction, no bill of exceptions or formal certificate in respect of the matter decided was required. *Petri v. Creelman Lumber Co.*, 199 *U. S.* 487–492, 50 L. ed. 285, Oct. T., 1905.

See Rule 21, *ante*, and Circuit Court of Appeals Rule 11, *infra*, and cases cited under Jurisdiction of the Supreme Court.

Briefs of counsel and oral arguments in the court below form no part of the record and are not adequate to create a Federal question, when the record does not disclose that any Federal question was set up and claimed in any proper manner in the court below. *Zadig v. Baldwin*, 166 *U. S.* 485–488, 41 L. ed. 1088, Oct. T., 1896.

RULE XXXVI—*Appeals and Writs of Error from District Courts*

1. An appeal or a writ of error from a District Court direct to this court, in the cases provided for in §§ 238 and 252 of the act entitled, “An act to codify, revise, and amend the laws relating to the judiciary,” approved March 3, 1911, chapter 231, may be allowed, in term time or in vacation by any justice of this court, or by any circuit judge assigned to the District Court, or by any district judge within his district, and the proper security be taken and the citation signed by him, and he may also grant a *supersedeas* and stay of execution or of proceedings, pending such writ of error or appeal.

2. Where such writ of error is allowed in the case of a conviction of an infamous crime, or in any other criminal case in which it will lie under § 238, the District Court, or any judge thereof, or any justice of this court, or any circuit judge assigned to the District Court, shall have power, after the citation is served, to admit the accused to bail in such amount as may be fixed.

Promulgated May 11, 1891, 139 *U. S.* 706; amended December 22, 1911, 222 *U. S.* Amended Feb. 26, 1912.

Decisions

The question of jurisdiction which the statute permits to be certified to the Supreme Court directly must be one involving the jurisdiction of the Circuit (District) Court as a Federal court and not simply its general authority as a judicial tribunal to proceed in harmony with established rules of practice governing courts of concurrent jurisdiction as between each other. *Louisville Trust Co. v. Knott*, 191 *U. S.* 225-233, 48 L. ed. 162, Oct. T., 1903.

Held the question of jurisdiction which the Act of Mar. 3, 1891, provided might be certified to the Supreme Court directly, must be one involving the jurisdiction of the Circuit Court as a Federal Court. The appeal is not directly to the Supreme Court upon such certificate where the jurisdiction of the Circuit (District) Court is only questioned in respect of its general authority as a judicial tribunal, and not in respect of its power as a court of the United States. *Bache v. Hunt*, 193 *U. S.* 523-525, 48 L. ed. 776, Oct. T., 1903.

Although there is an allegation of diverse citizenship in the bill, if the jurisdiction of the District Court is invoked on constitutional grounds the jurisdiction of the Supreme Court does not depend upon the question whether the right claimed under the Constitution has been upheld or denied in the court below, and its review is not limited to the constitutional question, but includes the whole case. *Holder v. Aultman M. & Co.*, 169 *U. S.* 81-88, 42 L. ed. 671, Oct. T., 1897.

In a cause where the jurisdiction of the Circuit Court rested solely on the ground that the cause of action arose under the Federal Constitution, an appeal was taken to the Supreme Court, although an appeal had then been perfected to the Court of Appeals and the case there docketed, and that court having rendered a decree therein an appeal was taken from such decree to the Supreme Court and both cases submitted as one, *Held*, the decree of the Court of Appeals must be reversed for want of jurisdiction; to review that court's decree on the merits would be to allow two appeals. *Union & Planters' Bk. v. Memphis*, 189 *U. S.* 71-74, 47 L. ed. 714, Oct. T., 1902.

Where an appeal is taken directly to the Supreme Court from so much of the decree of the District Court as denies the relief prayed on Federal grounds, the other party may take a cross-appeal direct to the same court as to any and all matters in such decree by which he deems himself aggrieved, and if he fails to take such cross-appeal the correctness of the decision against him will be presumed. *Field v. Barber Asphalt Co.*, 194 *U. S.* 618-621, 48 L. ed. 1153, Oct. T., 1903.

Where there is room for doubt whether the appeal should be directly to the Supreme Court or to the Court of Appeals, and an appeal is first

taken to the Supreme Court and afterwards to the Court of Appeals, such action is not a waiver of the right of appeal to the proper court. *Pullman, etc., Co. v. Central T. Co.*, 171 *U. S.* 138-145, 43 L. ed. 112, Oct. T., 1897.

The case of *Pullman Car Co. v. Central Transp. Co.*, 171 *U. S.* 138, distinguished, and held that where the record discloses that there are two writs of error, one to the Court of Appeals and one to the Supreme Court, the latter will be dismissed on motion; that the party against whom a judgment is rendered in the trial court must elect whether to go to the Supreme Court or the Court of Appeals. *Columbus Construction Co. v. Crane Co.*, 174 *U. S.* 600-602, 43 L. ed. 1103, Oct. T., 1898.

An appeal to the Supreme Court lies from a judgment of the Circuit Court of Appeals entered upon the judgment of the District Court as a court of bankruptcy, determining the title to property as between a trustee in bankruptcy and an adverse claimant. *Hewit v. Berlin Machine Works*, 194 *U. S.* 296-300, 48 L. ed. 987, Oct. T., 1903.

Held, a decree of the Circuit Court of Appeals was not made final by sec. 6 of the Act of 1891 (sec. 128, Judicial Code), where the jurisdiction of the Circuit Court was invoked by a foreign State, as that act did not include foreign States in the term "aliens." *Columbia v. Cauca Co.*, 190 *U. S.* 524-526, 47 L. ed. 1162, Oct. T., 1902.

If the District Court has jurisdiction of the parties and of the matters in dispute the fact that the remedy of the complainant is at law, rather than in equity, raises no question of jurisdiction within the meaning of sec. 5 of the Act of Mar. 3, 1891 (sec. 238, Judicial Code). If the District Court in such a case commit an error, it can only be remedied by an appeal to the Circuit Court of Appeals. *Smith v. McKay*, 161 *U. S.* 355-358, 40 L. ed. 732, Oct. T., 1895.

The Supreme Court has power to issue a writ of *supersedeas* under sec. 716, *Rev. Stats.* (*U. S. Comp. Stats.* 1901, p. 580), as a writ necessary for the exercise of its jurisdiction and agreeable to the usages and principles of law. This is equally true of the Circuit Court of Appeals, under sec. 12 of the Act of Mar. 3, 1891, now sec. 262, Judicial Code. *Re McKenzie*, 180 *U. S.* 536-549, 45 L. ed. 663, Oct. T., 1900.

An order granting a *supersedeas*, or a writ of *supersedeas* issued on such order made by a judge of the Circuit Court of Appeals is not void. The order granting a *supersedeas* and a writ thereon are effective, though the citation and bond have not been filed in the clerk's office. *Ib.* 550.

Any justice of the Supreme Court in or out of court may allow a writ of error to the District Courts of the United States, or to the courts of

the several States, sign the citation, and take the requisite security for prosecution, and grant a *supersedeas* when the writ itself does not operate as a stay of proceedings, as it does if filed and security given within sixty days after the judgment complained of. *Hudson v. Parker*, 156 U. S. 277-283, 39 L. ed. 426, Oct. T., 1894.

NOTE. See *Commissioners v. Gorman*, 19 Wall. 661, cited under Rule 29, *ante*.

Under the Federal statutes a person accused of crime may be admitted to bail as well after conviction, pending a writ of error, as before trial. *Ib.* 285.

Held, the first clause of the rule embraced all cases of which the Supreme Court had appellate jurisdiction under the Act of 1891. *Ib.* 284.

Although Clause 2 of old Rule 36 in terms limited the power to the justice allotted to the circuit to admit to bail, Held, that any justice might admit to bail independently of any rule of court, which authority is recognized by Rule 36. *Ib.* 287.

Such justice might either approve the bond or fix the amount and direct the court below to pass upon its sufficiency, or leave the bond to be dealt with by such court or judge. *Ib.* 287.

Held, under the Act of Mar. 3, 1891, a writ of error from the Supreme Court to the Circuit Court in the case of a conviction for an infamous crime, not capital, was a matter of right without security given, and, under sec. 999, *Rev. Stats.*, (*U. S. Comp. Stats.* 1901, p. 712), the citation may be signed by any justice of the Supreme Court and *supersedeas* granted (not only by the court under sec. 716, *U. S. Comp. Stats.*, 1901, p. 580, but by any justice thereof under sec. 1004, *Rev. Stats.*). *In re Classen*, 140 U. S. 200-205, 35 L. ed. 411, Oct. T., 1890.

As no security is required in a criminal case a *supersedeas* may be obtained by lodging a copy of the writ of error in the clerk's office, where the record remains within sixty days, Sundays exclusive, after the rendition of judgment, provided the justice who signs the citation directs that the writ shall operate as a *supersedeas*, as he may do when no security is required or taken. *Ib.* 209.

Rule 36 adopted and promulgated to remove all doubts and also to provide for admitting to bail after citation is served. *Ib.* 209.

NOTE. Jurisdiction of criminal cases not capital was withdrawn from the Supreme Court by the Act of Jan. 20, 1897 (29 Stat. L. 492).

Where the Circuit Court of Appeals commits an error in taking jurisdiction and determining a case it is not for the District Court to refuse to carry out its mandate. If the Circuit Court of Appeals erred, or its judgment can be held void the appropriate remedy is by certiorari from the Supreme Court to that court and not by direct appeal from the District Court to the Supreme Court after compliance with the

mandate of the Circuit Court of Appeals. *Aspen Mining, etc., Co. v. Billings*, 150 U. S. 31-37, 37 L. ed. 989.

RULE XXXVII—*Cases from Circuit Courts of Appeals*

1. Where, under § 239 of the act entitled "An act to codify, revise, and amend the laws relating to the judiciary," approved March 3, 1911, chapter 231, a Circuit Court of Appeals shall certify to this court a question or proposition of law, concerning which it desires the instruction of this court for its proper decision, the certificate shall contain a proper statement of the facts on which such question or proposition of law arises.

2. If application is thereupon made to this court that the whole record and cause may be sent up to it for its consideration, the party making such application shall, as a part thereof, furnish this court with a certified copy of the whole of said record.

3. Where an application is submitted to this court for a writ of certiorari to review a decision of a Circuit Court of Appeals or any other court, it shall be necessary for the petitioner to furnish as an exhibit to the petition a certified copy of the entire transcript of record of the case, including the proceedings in the court to which the writ of certiorari is asked to be directed. The petition shall contain only a summary and short statement of the matter involved and the general reasons relied on for the allowance of the writ. A failure to comply with this provision will be deemed a sufficient reason for denying the petition. Thirty printed copies of such petition and of any brief deemed necessary shall be filed. Notice of the date of submission of the petition, together with a copy of the petition and brief, if any, in support of the same shall be served on the counsel for the respondent at least two weeks before such date in all cases, except where the counsel to be notified resides west of the Rocky Mountains, in which cases the time shall be at least three weeks. The

Certificate for instructions under sec. 239, Judicial Code, to contain a statement of the facts.

Whole record must be part of any application for its consideration.

Certified copy of transcript of the record required on application for certiorari to review.

30 copies of petition and brief required.

brief for the respondent, if any, shall be filed at least three days before the date fixed for the submission of the petition. Oral argument will not be permitted on such petitions, and no petition will be received within three days next before the day fixed upon for the adjournment of the court for the term.

Promulgated May 11, 1891, 139 *U. S.* 706.

Promulgated December 22, 1911, 222 *U. S.* Clause 3 amended June 10, 1912.

Decisions

Only questions of gravity and importance should be certified for instructions, and only when such questions are involved should the power of the Supreme Court be invoked to require a case in which the judgment or decree of the Court of Appeals is made final, to be certified for review and determination. *Lau Ow Bew v. United States*, 141 *U. S.* 583-587, 35 L. ed. 870, Oct. T., 1891.

Only final judgments or decrees of the Circuit Court of Appeals are reviewable on certiorari. A judgment of that court reversing a judgment of the District Court and remanding the cause for proceedings consistent with the Circuit Court of Appeals' opinion is not final. *Chicago & Northwestern Ry. Co. v. Osborne*, 146 *U. S.* 354, 36 L. ed. 1003.

The petition for certiorari set forth in the case, and cases in point cited.

The writ of certiorari to review a judgment of the Circuit Court of Appeals will not be allowed when not seasonably applied for, where the cause has been brought to the Supreme Court on writ of error improperly sued out. *Ayres v. Polsdorfer*, 187 *U. S.* 585-596, 47 L. ed. 318, Oct. T., 1902; *Bonin v. Gulf Co.*, 197 *U. S.* 115-118, 49 L. ed. 971, Oct. T., 1904.

Held that there being room for doubt whether the Supreme Court or the Circuit Court of Appeals had jurisdiction to review the decree of the Circuit Court by taking an appeal to the Circuit Court of Appeals there was no waiver of a right of appeal to the Supreme Court at the same time from the same decree, and on motion to dismiss the appeal to the Supreme Court on application a writ of certiorari was granted to the Circuit Court of Appeals and upon the record being returned the cause was heard on its merits. *Pullman P. Car Co. v. Central Transportation Co.*, 171 *U. S.* 138-145, 43 L. ed. 112.

To comply with Rule 37 the certificate must contain a proper statement of the facts on which the questions or propositions of law arose. *Cin., H. & D. R. R. Co. v. McKeen*, 149 *U. S.* 259-261, 37 L. ed. 726, Oct. T., 1892.

It is then for the Supreme Court to determine whether it will answer the questions or propositions certified or order the whole record sent up, in order to determine the whole matter in controversy. *Ib.* 261.

A certificate is irregular when a quorum of the members of the Circuit Court of Appeals does not sit in the case. *Ib.* 260-261.

In a certificate under sec. 6 of the Act of Mar. 3, 1891 (sec. 239, Judicial Code), *held*: each question propounded must be a definite point or proposition of law, clearly stated so that it can be definitely answered without regard to other issues of law in the case. Each question must be a question of law only, and not of fact, or of mixed law and fact. The certificate cannot embrace the whole case, even where its decision turns on matters of law only, though it be split up into the form of questions. *Emsheimer v. New Orleans*, 186 U. S. 33-42, 46 L. ed. 1046, Oct. T., 1901.

A case where the entire bill, the demurrer, the trial court's order thereon, and the petition of appeal were sent up with the certificate. The questions therein contemplated an examination of the whole case and in large part its decision on the merits, and therefore the court declined to answer two of the three questions certified.

Where an appeal is taken under Clause 1 of sec. 5 of the Court of Appeals Act (sec. 238, Judicial Code), directly to the Supreme Court, it must appear either that the question of jurisdiction is certified or that the decree appealed from shows on its face that the sole question decided was one of jurisdiction. Where the decree dismissing a suit recites that it is dismissed for want of jurisdiction and the order allowing the appeal states it was allowed from the final decree dismissing the suit for want of jurisdiction, it is a sufficient certificate that the jurisdiction of the Circuit Court was in issue and the only question to be determined by the Supreme Court is as to the jurisdiction of that court. *Excelsior W. P. Co. v. Pacific Bridge Co.*, 185 U. S. 282-285, 46 L. ed. 913, Oct. T., 1901; *Re Woods*, 143 U. S. 202-206, 36 L. ed. 125; *Columbus Watch Co. v. Robbins*, 148 U. S. 269, 37 L. ed. 446; *American Construction Co. v. J. T. & K. W. Ry.*, 148 U. S. 372-383, 37 L. ed. 491; *Forsyth v. Hammond*, 166 U. S. 506-514, 41 L. ed. 1098; *Fields v. United States*, 205 U. S. 292-296, 51 L. ed. 810.

Upon objection that the certificate did not show whether the jurisdictional question arose from insufficient amount, want of diversity of citizenship, collusion or otherwise, *Held*, the court would look into the record and the opinion of the court contained therein, to determine whether the appeal was allowed solely upon the question of the jurisdiction of the court as a Circuit Court of the United States. *City of Chicago v. Mills*, 204 U. S. 321, 51 L. ed. 504.

If there appear to be an irreconcilable conflict between two judgments of the Supreme Court it is not competent to obtain a determination of such conflict upon a certificate of the question from the Circuit Court of Appeals, with the entire record of the cause in that court. The Supreme Court disapproves of that mode of ascertaining the bearing of its former judgments. *Graves v. Faurot*, 162 *U. S.* 435-437, 40 L. ed. 1031, Oct. T., 1895.

Upon a writ of error to review a judgment of the Circuit Court of Appeals it must appear that the jurisdiction of the lower court was not dependent solely upon the opposite parties being citizens of different States, and this is determined by an inspection of the declaration in the lower court. *Florida Central, etc., R. Co. v. Bell*, 176 *U. S.* 321-325, 44 L. ed. 489, Oct. T., 1899.

NOTE. The jurisdiction of a District Court of the United States must appear in the plaintiff's statement of his case. *Ib.* 327.

Although the declaration states no other ground of Federal jurisdiction save that the parties are citizens of different States, yet if the record shows the defendant relied upon any ground of defense embraced within the three last clauses of sec. 5 of the Act of Mar. 3, 1891 (sec. 238, Judicial Code), the Supreme Court has jurisdiction to directly review the decision of the Circuit (District) Court, the language of these clauses being "in any case." The statute does not exclude a case in which the Federal question therein was raised by the defendant, wherein it differs from sec. 709, *Rev. Stats.*, relating to a review of decisions of the highest court of a State. *Loeb v. Trustees, etc.*, 179 *U. S.* 472-477, 45 L. ed. 285, Oct. T., 1900.

As a general rule, where a case comes to the Supreme Court on certiorari to a Circuit Court of Appeals, the mandate will go directly to the District Court. Where the Circuit Court of Appeals has failed to decide the case, so that a review of the merits by the Supreme Court would be substantially the exercise of original jurisdiction the cause will be remanded to the Circuit Court of Appeals to discharge the duty cast upon it by law. *Lutcher and Moore Lumber Co. v. Knight*, 217 *U. S.* 257-268, 54 L. ed. 762.

So also where a judge who tried the cause in the District Court sits in the Circuit Court of Appeals to review the decree rendered by himself. *William Cramp & Sons, etc., Co. v. International, etc., Co.*, 228 *U. S.* 645.

Where on an appeal from an order granting an injunction the record presented to the Circuit Court of Appeals the whole case in such wise that it might properly have been disposed of on the appeal, upon a

review by certiorari granted before the case has gone back to the District Court, the Supreme Court may finally dispose of the case and accordingly direct the District Court. *Harriman v. Northern Securities Co.*, 197 *U. S.* 244-287, 49 L. ed. 760, Oct. T., 1904.

Where the Circuit Court had granted a preliminary injunction which was reversed by the Circuit Court of Appeals, whereupon the appellee, complainant in the Circuit Court, moved that the decree be modified so as to direct the dismissal of the bill, which motion being denied such appellee took an appeal to the Supreme Court, and subsequently the Circuit Court *sua sponte* dismissed complainant's bill, and allowed an appeal to the Court of Appeals, the Supreme Court granted a certiorari to bring up the last cause and considered both appeals together. *W. U. Tel. Co. v. Penn. R. Co.*, 195 *U. S.* 540-547, 49 L. ed. 315, Oct. T., 1904.

Although the Court of Appeals may be limited upon a second appeal to errors committed after its first mandate, no such limitation applies to the Supreme Court, when in the exercise of its supervisory powers it issues a writ of certiorari to the Court of Appeals to bring up the whole record. Upon such writ the entire case is before the Supreme Court for examination. *Panama R. Co. v. Napier Shipping Co.*, 166 *U. S.* 280-284, 41 L. ed. 1005, Oct. T., 1896.

Where the Circuit Court of Appeals affirmed a judgment on the ground that the defenses of plaintiff in error in the trial court were of an equitable nature where all the parties in the trial court had treated the defenses as legal, and no such question had been raised or submitted to the Circuit Court of Appeals *held*: plaintiff in error has been denied his day in court by such affirmance. *Lutcher and Moore L. Co. v. Knight*, 217 *U. S.* 257-267, 54 L. ed. 761.

Where the Circuit Court of Appeals has failed to consider the case before it, where it had jurisdiction, upon certiorari to that court, the case will be remanded to that court that its duty may be performed. *Ib.*

By the Judiciary Act of 1891 sec. 6 (sec. 240, Judicial Code), upon certiorari the entire record is before the Supreme Court, with power to decide the case as it was presented to the Circuit Court of Appeals. *Ib.*

On certiorari to the Circuit Court of Appeals to review its judgment the Supreme Court has the entire record before it, with power to review the action of the Court of Appeals as well as direct such disposition of the case as that court might have done when hearing the writ of error sued out for its review of the action of the trial court. *Dilk v. St. Louis & S. F. R. Co.*, 220 *U. S.* 580-588, 55 L. ed. 596.

Where on certiorari to the Circuit Court of Appeals to review the judgment of that court the Supreme Court finds the trial court com-

mitted no error it may reverse the judgment of the Circuit Court of Appeals and affirm the judgment of the trial court. *Ib.*

Held the provision of sec. 6 of the Act of Mar. 3, 1891, that appeals and writs of error must be sued out within one year, applied solely to writs of error and appeals to the Supreme Court from the Circuit Court of Appeals. To construe the section as relating to or controlling the review by error or appeal by the Supreme Court of the judgments or decrees of the District Courts would disregard the plain letter of the statute. *Allen v. So. Pacific R. Co.*, 173 *U. S.* 479-486, 43 L. ed. 777, Oct. T., 1898.

NOTE. Sec. 241, Judicial Code, has omitted the last clause of sec. 6. Act 1891, limiting the time for taking an appeal.

To avoid any question of the jurisdiction of the Supreme Court where a writ of error had been sued out to review the judgment of the Circuit Court of Appeals in a cause where one party contended the jurisdiction of the Circuit Court depended alone on diverse citizenship, and the other party contended there was a Federal question presented in the complaint, so that it was uncertain whether the judgment of the Court of Appeals was final, where there had been protracted litigation involving a large amount, the writ of certiorari was allowed to bring up the judgment of the Court of Appeals for review. *Montana Min. Co. v. St. Louis M. & M. Co.*, 204 *U. S.* 204, 51 L. ed. 444.

Held, the only instance in which certiorari was named in the Federal statutes as the writ for the removal of cases from a lower to a higher court was the authority given to the Supreme Court by the Act of Mar. 3, 1891, to bring up cases from the Circuit Courts of Appeal by certiorari. *Whitney v. Dick*, 202 *U. S.* 132-138, 50 L. ed. 965, Oct. T., 1905.

The Supreme Court has jurisdiction to issue certiorari to the Circuit Court of Appeals under sec. 716, *Rev. Stats. (U. S. Comp. Stat. 1901, p. 580, sec. 262, Judicial Code)*. Writ issued in a case of original application to the Circuit Court of Appeals for mandamus to a district judge to proceed in a cause in the Circuit Court in which jurisdiction did not depend on citizenship so that the judgment of the Circuit Court of Appeals was not final. *McClellan v. Garland*, 217 *U. S.* 268-277, 54 L. ed. 765.

Upon a petition for the writ of certiorari or mandamus to review a decision of the Court of Appeals dismissing a writ of error for alleged want of jurisdiction, and a rule to show cause issued, the return to the rule was directed to stand as a return to the writ (ordered to issue) and the record being before the Supreme Court upon the return to the

rule, the judgment of the Court of Appeals was reversed upon such return and record. *American Sugar Refining Co. v. New Orleans*, 181 U. S. 277-283, 45 L. ed. 862, Oct. T., 1900.

The exceptional power to review upon certiorari a decision of the Circuit Court of Appeals rendered on an appeal from an interlocutory order, is sparingly exercised. *Denver v. New York Trust Co.*, 229 U. S. 123.

RULE XXXVIII—*Interest, Cost, and Fees*

The provisions of Rules 23 and 24 of this court, in regard to interest and costs and fees, shall apply to writs of error and appeals and reviews under the provisions of secs. 238, 239, 240 and 241 of the act entitled "An act to codify, revise, and amend the laws relating to the judiciary," approved March 3, 1911, chapter 231.

Promulgated May 11, 1891, 139 U. S. 707. Amended Dec. 22, 1911, 222 U. S.

RULE XXXIX—*Mandates*

Mandates shall issue as of course after the expiration of thirty days from the day the judgment or decree is entered, unless the time is enlarged by order of the court, or of a justice thereof when the court is not in session, but during the term.

Promulgated Nov. 25, 1895, 159 U. S. 709, 40 L. ed. 1134. Amended Dec. 22, 1911, 222 U. S.

Decisions

The Supreme Court will determine whether the court below has rightly apprehended and executed its mandate. To ascertain the true intention of the decree and mandate, the decree of the court below and of the Supreme Court and the proceedings will be considered. *Mitchell v. United States*, 15 Pet. 52-84, 10 L. ed. 670, Jan. T., 1841.

Upon all the proceedings to carry into effect the decree of the Supreme Court, the original proceedings are always before the court below, so far as they are necessary to determine any new points or rights in controversy between the parties which were not terminated by the original decree. *The Santa Maria*, 10 Wheat. 431-442, 6 L. ed. 361, Feb. T., 1825.

The trial court is bound by the judgment or decree as the law in the case and must carry it into execution according to the mandate.

It must not vary it, or examine it for any other purpose than execution, or give any other or further relief, or review it on any matter decided on appeal for error apparent, or intermeddle with it further than to settle so much as has been remanded. *Sibbald v. United States*, 12 *Pet.* 488-492, 9 L. ed. 1169, Jan. T., 1838.

If the mandate is not executed, a mandamus or other appropriate writ will issue. *Ib.* 493.

Where the final decree or judgment rendered by the Supreme Court requires some further act, it cannot issue an execution, but must send a special mandate to the court below to award it. *Ib.* 493.

The Supreme Court has no power to review its decisions whether at law or in equity. *Ib.* 492.

Where the mandate issued by the clerk is not in conformity with the decree, a new mandate according to the decree will be granted at a subsequent term, and it requires no new order or decree modifying that which has been rendered. *Ib.* 496.

It is the duty of the trial court to carry the mandate into execution even though its jurisdiction does not appear in the pleadings. *Magwire v. Tyler*, 17 *Wall.* 253-284, 21 L. ed. 583, Dec. T., 1873.

If the court below entertains doubts as to the construction and meaning of the mandate of the Supreme Court it may suspend its execution until the decision of that court had upon motion or by appeal. *Perkins v. Fourniquet*, 14 *How.* 329-330, 14 L. ed. 442, Dec. T., 1852.

The mandate of the Supreme Court must be the guide to govern the court below in executing it. Where there is uncertainty or ambiguity in the mandate the court below has the right to resort to the opinion delivered at the time to assist in explaining it. *West v. Brashear*, 14 *Pet.* 51-54, 10 L. ed. 352, Jan. T., 1840.

When a mandate is sent to the court below no appeal will lie from any order or decision of that court until it has passed its final decree in the case. If that court does not proceed to execute the mandate, or disobeys or mistakes its meaning, the party aggrieved may at any time by a motion for a mandamus, bring up for correction the errors or omissions of the inferior court. *United States v. Fossatt*, 21 *How.* 445-446, 16 L. ed. 186, Dec. T., 1858.

When the court below executes the mandate in accordance with its terms without further action, no review can be had. *United States v. Fremont*, 18 *How.* 30-36, 15 L. ed. 303, Dec. T., 1855.

If an appeal is taken the Supreme Court will, on application of appellee, examine the decree entered, and if it conforms to the mandate

dismiss the case with costs; if it does not, it will remand the case with appropriate directions for the correction of the error. *Stewart v. Salamon*, 97 *U. S.* 361-362, 24 L. ed. 1045, Oct. T., 1878.

A subsequent appeal brings up for consideration in the appellate court only the proceedings of the trial court after the mandate returned to it. *Supervisors v. Kennicott*, 94 *U. S.* 498, 24 L. ed. 260, Oct. T., 1876.

Where in an equity cause the decree ordered the cause to be remanded "with directions to award a new trial," *Held*, that as in a suit in equity there can be no new trial, and as mandates are to be interpreted according to the subject-matter of the proceedings in the appellate court, the words "new trial" meant such further proceedings as were necessary to carry into effect what the appellate court had determined. *Ib.* 499.

A second appeal lies only when the court below in carrying out the mandate of the Supreme Court is alleged to have committed some error. *Corning v. Troy I. & N. Factory*, 15 *How.* 451-466, 14 L. ed. 775, Dec. T., 1853.

After a cause has been decided upon its merits in the Supreme Court, remanded to the court below, and then brought up on a second appeal, it is too late to allege that the court had not jurisdiction to try the first appeal. *Washington Bridge Co. v. Stewart*, 3 *How.* 413-425, 11 L. ed. 664, Jan. T., 1845.

The reason for this judgment stated to be, that to grant the motion to dismiss the case in the court below would be equivalent to a judgment that the final decree of the Supreme Court could be reviewed, when the law points out no method by which that can be done. *Ib.* 425.

The Supreme Court held that after a cause had been sent back to the Circuit Court upon a final decree upon the merits in the Supreme Court, the Circuit Court was bound to carry the decree into execution though that court then discovered that the cause was not within its jurisdiction. *Sellern's Executors v. May's Executors*, 6 *Cranch*, 267.

Obeysing the mandate of the Supreme Court is not discretionary with the District Court, hence cases which hold that an appellate court will not direct in what manner the discretion of an inferior tribunal shall be exercised have no application upon a petition for mandamus to compel the District Court to obey the mandate sent it. *Gaines v. Caldwell*, 148 *U. S.* 228-239, 37 L. ed. 435, Oct. T., 1892.

Mandamus allowed though the question might have been raised by a new appeal. *Ib.* 243.

A decree was passed dismissing the bill of complaint June 3, 1836. On Oct. 1, 1836, upon petition stating that the complainant had died after the suit was decided, the executrix was permitted to become a party and took an appeal to the Supreme Court which reversed the decree with a mandate directing further proceedings. Thereafter in the court below the defendant sought to file affidavits and then an answer setting up that the complainant died before the decree appealed from, which the judge refused to receive or to suffer any notice taken of the proceedings upon the records of the court. Upon petition for mandamus, *Held*, on the authority of *Sellern's Exrs. v. May's Exrs.*, 6 *Cranch*, 267, that the facts offered to be proved formed no defense against the execution of the mandate, and the Circuit Court was bound to carry into execution the decree rendered in the cause by the Supreme Court. *Ex parte* Story, 12 *Pet.* 339-444, 9 L. ed. 1110, Jan. T., 1838.

Section 24 of the Judiciary Act of 1789 governs (governed) the practice in cases brought up for review in the Supreme Court. The law directs that a mandate shall be sent down to have the judgment entered as final in the lower court when it is for the defendant below. *Ex parte* Dubuque & P. R. Co., 1 *Wall.* 69-73, 17 L. ed. 515, Dec. T., 1863.

Where the Supreme Court had reversed a judgment of the Circuit Court in an ejectment suit and remanded the cause with a mandate to enter judgment for the defendant below, but because by the law of the State a second trial was allowed for recovery of real estate, the court below received affidavits showing new facts and granted a new trial, the Supreme Court by mandamus ordered it to vacate the rule for a new trial, because its authority extended only to executing the mandate. *Ib.* 73.

The affirmance of the judgment of a subordinate court in general terms, nothing being said about interest, is to be taken as a declaration that no interest is to be allowed; thereupon it is the duty of the subordinate court to enter its judgment in strict accordance, and not to add to it the allowance of interest. *Ex parte* Washington and G. R. Co., 140 *U. S.* 91-94, 35 L. ed. 341, Oct. T., 1890.

Where interest was improperly allowed after mandate sent down, which amounted to a sum insufficient for appeal, mandamus held to lie to correct the error, there being no other adequate remedy and the action of the lower court not being discretionary. *Ib.* 95.

Where the merits of a case have been once decided on appeal, the District Court has no authority, without express leave of the Supreme Court, to grant a rehearing or review, or permit new defenses on the merits to be introduced in an answer by amendment. *Re* Potts, 166 *U. S.* 263-267, 41 L. ed. 995, Oct. T., 1896.

An appellate court may not remand a cause to allow an amendment asserting a new and distinct ground of relief, constituting a departure from the original theory of the case, and at the same time direct that the cause be not reopened so as to deprive the defendants of all hearing on such new ground of relief. *Warner v. Godfrey*, 186 *U. S.* 365-377, 46 L. ed. 1208, Oct. T., 1901.

Where upon bill and answer to which exceptions were sustained and upon defendant declining to plead further a final decree was entered for complainant and by the opinion and mandate the cause was reversed and remanded to the Circuit Court for further proceedings not inconsistent with the opinion of the Supreme Court, *Held*, the complainant had a right to file a replication, but the Circuit Court in its discretion might, after remand, allow amendments of the pleadings. *Re Sanford Fork & Tool Co.*, 160 *U. S.* 247-259, 40 L. ed. 417, Oct. T., 1895.

Where a decision has been had on appeal, a bill of review for newly discovered evidence will not lie unless the right is reserved in the decree of the appellate court, or permission be given on application to that court directly. *Southard v. Russell*, 16 *How.* 570-571, 14 L. ed. 1062, Dec. T., 1853.

State courts have no power to deny the jurisdiction of the Supreme Court in a case brought there for decision and sent back to the State court with its mandate.

Where it is clear that the State court from its view of the law will not carry into effect the directions of the Supreme Court as given in its mandate, that court will proceed to a final decision of a cause brought to it by writ of error from the State court and will award execution to the prevailing party. *Magwire v. Tyler*, 17 *Wall.* 253-290, 21 L. ed. 584-586, Dec. T., 1872.

This power is conferred as to causes once remanded by sec. 25 of the Judiciary Act of 1789, and as to causes not before remanded by the Act of Feb. 5, 1867 (14 *Stat. L.* 387). *Ib.* 290.

In this case the State court on filing the mandate refused to proceed with the cause because the proceedings had been equitable, and by the State practice the right adjudged by the Supreme Court was held enforceable only by an action at law. The final decree entered by the Supreme Court is printed in full, p. 294, 21 L. ed. 586.

In causes remanded to the Circuit (District) Courts if the mandate be not correctly executed a writ of error or appeal is the proper remedy. *Martin v. Hunter's Lessee*, 1 *Wheat.* 304-354, 4 L. ed. 109, Feb. T., 1816.

The 25th section of the Judiciary Act of 1789 gave the same effect to writs of error from State Courts as of the Circuit Courts. *Ib.*

In this case the Court of Appeals of Virginia on receipt of the mandate of the Supreme Court refused to obey it and entered judgment that sec. 25 of the Judiciary Act was unconstitutional, and on writ of error the Supreme Court reversed the judgment of the Court of Appeals and made a final judgment.

The court whose judgment has been reversed or affirmed by the Supreme Court cannot rejudge that reversal or affirmance, but the highest court of every State has power to decide upon its own jurisdiction and upon the jurisdiction of all the inferior courts to which its appellate power extends. *Davis v. Packard*, 8 Pet. 312-323, 8 L. ed. 961, Jan. T., 1834.

The mandate of the Supreme Court to the Court of Errors of New York is printed in full, p. 314.

Where judgment in a cause tried by the court without a jury has been reversed, and the cause remanded with directions to award a new trial, upon a second writ of error it is too late to object that the original judgment in the Supreme Court should have been final upon the findings made by the Circuit Court at the first trial instead of awarding a *venire de novo*. The court cannot review on the second writ of error the judgment it rendered on the former writ of error. *Ames v. Quimby*, 106 U. S. 342-349, 27 L. ed. 103, Oct. T., 1883.

A special finding of facts is, under sec. 649, *Rev. Stats. (U. S. Comp. Stats. 1901, p. 525)*, equivalent to the special verdict of a jury. Where such finding covers all the issues raised by the pleadings, the Supreme Court, under sec. 701, *Rev. Stats.*, should direct such judgment to be entered in the court below as the special finding requires. *Fort Scott v. Hickman*, 112 U. S. 150-165, 28 L. ed. 641, Oct. T., 1884.

When cases are brought to the Supreme Court to review the judgments of the Circuit Court of Appeals in revision of judgments of the courts below, the Supreme Court's mandate goes to the court of first instance, and is there carried into effect, though the Court of Appeals may have sent its own mandate down before the case was brought to the Supreme Court by appeal, writ of error, or certiorari. *Louisville & Nashville R. Co. v. Behlmer*, 169 U. S. 644-648, 42 L. ed. 890, Oct. T., 1897.

That a decree has been entered in the Circuit (District) Court on receipt of a mandate from the Circuit Court of Appeals in accordance therewith, does not cut off an appeal from the decision of such Court of Appeals, or cause any difficulty in the Supreme Court's dealing with the cause in the Circuit (District) Court. *Merrill v. N. Bank of Jacksonville*, 173 U. S. 131-134, 43 L. ed. 642, Oct. T., 1898.

RULE XL—*Practice in Cases from Circuit Courts of Appeals*

The provisions of these rules relating to the practice on direct writs of error to and appeals from the District Courts shall also be deemed to relate to and cover the practice on writs of error to and appeals from the Circuit Court of Appeals.

Promulgated Dec. 22, 1911.

STATUTORY PROVISIONS
PERTAINING TO THE
PRACTICE IN THE CIRCUIT COURT OF
APPEALS

See the Judicial Code, Act March 3, 1911, *post*, page .

Act of March 3, 1891, c. 517, sec. 10, 26 *Stat.* 829, reads as follows:

“Sec. 10. That whenever on appeal or writ of error or otherwise a case coming directly from the District Court or existing Circuit Court shall be reviewed or determined in the Supreme Court the cause shall be remanded to the proper District or Circuit Court for further proceedings to be taken in pursuance of such determination. And whenever on appeal or writ of error or otherwise a case coming from a Circuit Court of Appeals shall be reviewed and determined in the Supreme Court the cause shall be remanded by the Supreme Court to the proper District or Circuit Court for further proceedings in pursuance of such determination. Whenever on appeal or writ of error or otherwise a case coming from a District or Circuit Court shall be reviewed and determined in the Circuit Court of Appeals in a case in which the decision in the Circuit Court of Appeals is final, such cause shall be remanded to the said District or Circuit Court for further proceedings to be there taken in pursuance of such determination.”

Act of March 3, 1891, c. 517, sec. 11, 26 *Stat.* 829, reads as follows:

“Sec. 11. That no appeal or writ of error by which any order, judgment or decree may be reviewed in the Circuit Court of Appeals under the provisions of this act shall be taken or sued out except within six months after the entry of the

order, judgment or decree sought to be reviewed: Provided, however, that in all cases in which a lesser time is now by law limited for appeals or writs of error such limits of time shall apply to appeals or writs of error in such cases taken to or sued out from the Circuit Courts of Appeals. And all provisions of law now in force regulating the methods and system of review, through appeals or writs of error, shall regulate the methods and system of appeals and writs of error provided for in this act in respect of the Circuit Courts of Appeals, including all provisions for bonds or other securities to be required and taken on such appeals and writs of error, and any judge or judges of the Circuit Courts of Appeals in respect of cases brought or to be brought to that court, shall have the same powers and duties as to the allowance of appeals or writs of error, and the conditions of such allowance as now by law belong to the justices or judges in respect of the existing courts of the United States respectively."

AUTHORITIES

UPON THE

JURISDICTION AND PRACTICE OF THE CIRCUIT COURT OF APPEALS

The Circuit Courts of Appeal are not endowed with any original jurisdiction. They were by the act creating them simply given appellate jurisdiction over certain specified courts, and, therefore, are not authorized to issue original and independent writs, *Held*: no authority to issue the writ of certiorari as a substitute for the writ of error or an appeal was granted to the Circuit Courts of Appeal by the Act of March 3, 1891. *Whitney v. Dick*, 202 *U. S.* 132-140, 50 *L. ed.* 966, Oct. T., 1905.

The Circuit Court of Appeals has power to issue the writ of certiorari only in aid of its appellate jurisdiction and cannot issue such a writ to review the action of a Circuit (District) Court which is not appealable. *United States v. Montana Ore Pur. Co.*, 126 *Fed. R.* 169, 61 *C. C. A.* 315.

Where, upon an appeal from a decree of the Circuit (District) Court, the whole case is taken to the Circuit Court of Appeals, although the appellant might have taken the case to the Supreme Court of the United States on the question of jurisdiction alone, the Circuit Court of Appeals has the choice either to certify the question of jurisdiction to the Supreme Court, or itself decide the question; and this, though all assignments of error, except as to the question of jurisdiction, are abandoned. *Wirgman v. Persons*, 126 *Fed. R.* 449-455, 62 *C. C. A.* 63.

If the jurisdiction of the Circuit (District) Court is objected to and on issue is decided in favor of the defendant, the Circuit Court of Appeals has no jurisdiction to review the decision, because it disposes of the case, and the plaintiff must have the question certified and take his appeal or writ of error to the Supreme Court. *Campbell v. The Golden Cycle Min. Co.*, 141 *Fed. R.* 610-612, 73 *C. C. A.* 260, citing *United States v. Jahn*, 155 *U. S.* 109-114, 39 *L. ed.* 87.

Where the question of jurisdiction is in issue, and the jurisdiction is sustained and a judgment or decree is rendered in favor of the de-

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fendants on the merits, the Circuit Court of Appeals has jurisdiction to review the decision below. *Ib.* 612.

Under the Act of Mar. 3, 1891, establishing the Circuit Court of Appeals it was held (1) that if the jurisdiction of the Circuit Court is in issue and decided in favor of the defendant, as that disposes of the case, the plaintiff should have the question certified and take his appeal, or writ of error direct to the Supreme Court.

(2) If the question of jurisdiction is in issue, and the jurisdiction sustained, and then judgment or decree is rendered in favor of defendant on the merits, the plaintiff, who has maintained the jurisdiction, must appeal to the Circuit Court of Appeals, where if the question of jurisdiction arises the Circuit Court of Appeals may certify it to the Supreme Court.

(3) If the question of jurisdiction is in issue, and the jurisdiction sustained and judgment on the merits is rendered in favor of the plaintiff, then the defendant can elect either to have the question certified and come directly to the Supreme Court, or to carry the whole case to the Circuit Court of Appeals, and the question of jurisdiction can be certified by that court.

(4) If, in the case last supposed, the plaintiff has ground of complaint in respect to the judgment he has recovered, he may also carry the case to the Circuit Court of Appeals on the merits, and this he may do by way of cross-appeal or writ of error, if the defendant has taken the case there, or independently, if the defendant has carried the case to the Supreme Court on the question of jurisdiction alone, and in this instance the Circuit Court of Appeals will suspend a decision upon the merits until the question of jurisdiction has been determined.

(5) The practice is the same where plaintiff objects to the jurisdiction, and is or both parties are dissatisfied with the judgment on the merits.

United States v. Jahn, 155 *U. S.* 109-114, 39 L. ed. 87.

When a case is removed from a State court to the United States court and the jurisdiction sustained, the question of jurisdiction cannot be reviewed on a writ of error to the Circuit Court of Appeals, but after final judgment may be reviewed on error or appeal by the Supreme Court. *Missouri Pac. Ry. v. Fitzgerald*, 160 *U. S.* 571-582, 40 L. ed. 536.

Under the 6th sec. of the Act of Mar. 3, 1891, establishing the Court of Appeals (sec. 128, Judicial Code), the judgments or decrees of the Circuit Court of Appeals are made final in all cases, in which the jurisdiction of the Circuit Court attaches solely by reason of diverse citizenship, and it follows that the Court of Appeals has power to review the judgment of the Circuit (District) Court in every such case, notwithstanding constitutional questions may have arisen after the jurisdiction of the

trial court attached. *Am. Sugar R. Co. v. New Orleans*, 181 *U. S.* 277, 280, 45 L. ed. 859.

Where the plaintiff by proper pleading avers facts by which it appears that the suit does really and substantially involve a dispute or controversy as to a right which depends on the construction or application of the Constitution or some law or treaty of the United States, the appellate jurisdiction of the Supreme Court under sec. 5 of the Act of Mar. 3, 1891 (sec. 238, Judicial Code), is exclusive.

If the plaintiff by proper pleading places the jurisdiction of the Circuit (District) Court on diverse citizenship, and also on grounds independent of that question, and the case is taken to the Court of Appeals, propositions as to the latter grounds may be certified to the Supreme Court, or if that course is not pursued, and the case goes to judgment, an appeal or writ of error from the Supreme Court will lie under the last clause of sec. 6 (sec. 128, Judicial Code), because the jurisdiction does not depend solely on diverse citizenship. *Ib.* 281.

The language used in the case of *Carter v. Roberts*, 177 *U. S.* 406, 44 L. ed. 861, should not be construed to mean that in cases where the jurisdiction below is invoked on the ground of diverse citizenship, the Circuit Court of Appeals may decline to take jurisdiction or dismiss the appeal or writ of error for want of jurisdiction. The fact that in such a case one or more of the constitutional questions referred to in sec. 5 of the Act of Mar. 3, 1891 (sec. 238, Judicial Code), may have so arisen that a direct resort to the Supreme Court might be had, does not deprive the Court of Appeals of jurisdiction, or justify it in declining to exercise it. *Ib.* 282.

Where the jurisdiction of the Circuit (District) Court depends solely on diverse citizenship and it turns out the case involves the construction or application of the Constitution of the United States, or the constitutionality of a law of the United States, or the validity or construction of a treaty is drawn in question, or the constitution or law of a State is claimed to be in contravention to the Constitution of the United States, the Circuit Court of Appeals may certify the constitutional or treaty question to the Supreme Court, and proceed as thereupon advised, or it may decide the whole case. *Ib.* 282.

Where the jurisdiction of the Circuit Court rests on diverse citizenship and not on any other ground, although independent of that, constitutional grounds may appear in the pleadings of the plaintiff, and a decree has been therein rendered, from which an appeal to the Circuit Court of Appeals has been taken, and that court goes on and decides the case, its decision will be final and the jurisdiction of the Supreme Court cannot thereafter be invoked directly on another writ of error to the Circuit (District) Court, but the interposition of that court can only be invoked by certiorari to the Circuit Court of Appeals. *Ib.* 279.

NOTE. The case reported in 104 *Fed. R.* 2, reversed on writ of certiorari. 181 *U. S.* 277.

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Where jurisdiction is founded on diversity of citizenship but thereafter issues are raised, the decision of which brings the case within either of the classes set forth in sec. 5 of the Act of 1891 (sec. 238, Judicial Code), the case may be brought directly to the Supreme Court or to the Circuit Court of Appeals, in which event the final judgment of the Court of Appeals may not as of right be reviewed by the Supreme Court.

If the jurisdiction of the Circuit (District) Court rests on the ground that the suit arises under the Constitution, laws, or treaties of the United States the jurisdiction for review is exclusively in the Supreme Court.

If the jurisdiction beside is placed on the ground of diverse citizenship and also on grounds independent of that which allow a review by the Supreme Court, then if carried to the Court of Appeals, the decision of that court will not be final. *Huguley Mfg. Co. v. Galetton Mills*, 184 U. S. 290-295, 46 L. ed. 548, Oct. T., 1901.

The general intention of the Act of 1891 was to permit an appeal to only one court. *Ib.* 295.

The jurisdiction referred to in sec. 128, Judicial Code, is the jurisdiction of the District Court as originally invoked.

Where the jurisdiction of the District Court is invoked solely on the ground of diverse citizenship and there is developed in the course of the proceedings a Federal question of such a character that no appeal or writ of error may be taken directly to the Supreme Court, the decree of the Circuit Court of Appeals will be final. *Ayers v. Polsdorfer*, 187 U. S. 585, 47 L. ed. 316.

In determining whether sufficient diverse citizenship exists the whole record may be looked to for the purpose of curing a defective averment of citizenship in the bill of complaint. *Sun Printing & Publishing Assn.*, 194 U. S. 377-382, 48 L. ed. 1027.

Where an appeal was dismissed because of a defective averment of citizenship of the parties, *Held*, that the Court of Appeals might permit an amendment in that court supplying an averment of citizenship requisite to give jurisdiction, where both parties had appeared in that court and agreed in writing to such amendment. *Kansas City So. Ry. Co. v. Prunty*, 133 *Fed. R.* 13-17, 66 *C. C. A.* 163.

In an action against several defendants, where the liability of each depends upon the same ground, and no proceedings were taken looking to a severance, where one of the joint defendants raised a question of the jurisdiction of the trial court, while the other defendants defended on the merits, *Held* the entire case as to all the defendants was appealable to the Circuit Court of Appeals, by analogy to the situation where a single defendant presents a question of jurisdiction and a question on the

merits. *A. J. Phillips Co. v. Grand Trunk Western Ry. Co.*, 195 *Fed. R.* 12, 115 *C. C. A.* 94-102.

A writ of error to the Circuit (District) Court involving a question of whether that court acquired jurisdiction of the defendant by virtue of the service of a summons, in a suit pending in the State court and thereafter removed into the Federal court, is not within the jurisdiction of the Circuit Court of Appeals, but is only reviewable by the Supreme Court. *St. Louis Cotton Comp. Co. v. American Cotton Co.*, 125 *Fed. R.* 196-199, 60 *C. C. A.* 80.

Held, by the Circuit Court of Appeals, that under sec. 5 of the Act of Mar. 3, 1891, that court had not, but the Supreme Court had, jurisdiction to review by writ of error or appeal taken directly to the Supreme Court from the United States Circuit Court, every question which involves the jurisdiction of the latter court, whether that question is peculiar to the Federal courts as such, or common to all courts. *Ib.* 201.

The Circuit Court of Appeals has no jurisdiction of any case involving the jurisdiction of the Circuit (District) Court, where that court has dismissed the suit upon the ground of lack of jurisdiction. *Ib.* 202.

When it appeared that the parties had been improperly or collusively joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under the Act of 1875, then the Circuit Court was without jurisdiction to proceed within the meaning of the Act of 1891. *Merritt v. Bowdoin College*, 169 *U. S.* 551-556, 42 *L. ed.* 852.

The Act of April 14, 1906, c. 1627, sec. 7, 34 *Stat.* 116 (*U. S. Comp. Stat.* 1901, Supp. 1907, p. 209), prescribed an appeal might be taken within 30 days from the entry of any order granting or continuing an injunction or appointing a receiver on a "hearing in equity" in a District Court or by a judge thereof in vacation. *Held* the phrase "hearing in equity" meant the hearing of the motion, the introduction of evidence by affidavit or otherwise, argument, and order of the Chancellor, interlocutory with reference to the final decree, but complete for the purpose of an appeal under the Act of Congress. *Root v. Mills*, 168 *Fed. R.* 688, 94 *C. C. A.* 174.

Interlocutory orders under sec. 7, Act 1891 (*U. S. Comp. Stat.* 1901, p. 550 sec. 129, Judicial Code), which may be reviewed on appeal are orders in the nature of "executions before judgment" and in effect either ousting parties from the possession of property, or injuriously controlling the management and disposition of property.

An administrative order looking to the preservation of the rights of the parties pending litigation which does not disturb title or possession

is not within the purview of the statute and is not appealable. *Gulf Refining Co. v. Vincent Oil Co.*, 185 *Fed. R.* 87, 107 *C. C. A.* 307.

Sec. 7, Act Mar. 3, 1891, as amended by the Acts of February 18, 1895, June 6, 1900, and April 14, 1906 (34 *Stat.* 116) did not provide for an appeal from an interlocutory decree dissolving or refusing to grant a temporary injunction or refusing to appoint a receiver, but upon an appeal from the final decree in the cause, all interlocutory orders made in the progress of the case are subject to review. *Texas Co. v. Central Fuel Oil Co.*, 194 *Fed. R.* 1, 114 *C. C. A.* 21-42.

The power of the Circuit Court of Appeals to determine the merits upon an appeal from the whole of an interlocutory order or decree granting an injunction and ordering an account is not affected by the authority of the trial court to order a stay in the proceedings in that court pending the appeal. *Smith v. Vulcan Iron Works*, 165 *U. S.* 518-524, 41 *L. ed.* 810.

A stay order against prosecution of a suit at law made in an equity cause brought to cancel the contract and enjoin proceedings at law, wherein the respondent had sued the complainant for a breach, where the action at law had been stayed by agreement of counsel, which agreement the court was advised by counsel they no longer wished to be binding, *Held*, not appealable under sec. 7 of the Circuit Court of Appeals Act (34 *Stat.* 116). *Pressed Steel Car Co. v. Chicago & A. R. Co.*, 192 *Fed. R.* 517, 113 *C. C. A.* 73.

Where a preliminary injunction was granted Feb. 24th and on March 21st, defendant filed a motion that the court grant a rehearing of plaintiff's motion to show cause, to the end that the preliminary injunction granted might be dissolved, which rehearing was allowed and the motion to dissolve was denied on April 4th and an appeal from the order granting the preliminary injunction was allowed April 20th. *Held*, the appeal was not taken within the time prescribed by sec. 7 of the Act of March 3, 1891, c. 517, 26 *Stat.* 828 (*U. S. Comp. Stat.* 1901, p. 550, sec. 129, Judiciary Act). *Pioneer Lace Mfg. Co. v. Dodd*, 181 *Fed. R.* 688, 104 *C. C. A.* 586.

An order refusing to dissolve a preliminary injunction cannot be construed as an order continuing an injunction so as to bring the case within the operation of sec. 7 above mentioned, citing cases. *Ib.*

Formerly an order granting a temporary injunction was not reviewable but was in the absolute discretion of the Circuit Court. The Act of Mar. 3, 1891, c. 517, 26 *Stat.* 826, allowed an appeal from such a decree, but the order granting an injunction pending the suit is in the sound judicial discretion of the Circuit (District) Court, and this order will not be disturbed on appeal unless it violates the rules of equity which have been established for the guidance of its discretion. *Lehman v. Graham*, 135 *Fed. R.* 42, 67 *C. C. A.* 513. See sec. 129, Judicial Code.

Where a demurrer to a bill was sustained upon the ground that the bill did not state sufficient facts to warrant the relief sought, and leave was granted to file an amended bill; *Held*, that a temporary injunction issued upon the original bill was dissolved when the demurrer was sustained, and that complainants had the right to pursue either of two courses, viz: to submit to final judgment against it and bring the cause to the Circuit Court of Appeals for review; or to amend its bill without the right to review the action of the trial court. *Held*, further, that no appeal could be taken from so much of the order of the trial court as undertook to work a dissolution of the restraining order, which under the statute as it then existed was not appealable, sec. 7 of the Act of Mar. 3, 1891, establishing the Court of Appeals having been amended by the Act of June 6, 1900, chap. 803, 31 (*Stats. L.*) 660. *Frye & Bruhn v. Carstans*, 130 *Fed. R.* 766, 767, 65 *C. C. A.* 192. See sec. 129, Judicial Code.

An appeal will not lie from a decree dismissing a bill as to certain defendants until after final decree in the cause. *Hohorst v. Hamburg Co.*, 148 *U. S.* 262, 37 *L. ed.* 443.

The denial of a petition for intervention in a proceeding for set-off of judgments made against one claiming all the interests of one of the parties to the cause is a final order. *Cathay Trust, Limited, v. Brooks*, 193 *Fed. R.* 973, 114 *C. C. A.* 125.

Where the whole merits of the controversy have been settled as to any of the defendants the decree is final, even if there was a reversible matter left to be determined in which appellants had no interest. *Hill v. Chicago and Evanston R. R. Co.*, 140 *U. S.* 52, 35 *L. ed.* 332.

On appeal under sec. 7 of the Act of March 3, 1891 (sec. 129, Judicial Code) *Held* the Circuit Court of Appeals might decide the case on its merits and render or direct a final decree, but if the decree of the Circuit Court was not final no appeal lies to the Supreme Court in the cause. *Kirwin v. Murphy*, 170 *U. S.* 205-210, 42 *L. ed.* 1011.

Where one of the parties to a joint judgment was never joined, or notified to join, or severed for failure or refusal to join, the Circuit Court of Appeals has no power to cure the defect by amendment, but will dismiss the appeal on motion. *Copland v. Waldron*, 133 *Fed. R.* 217-219.

An order of the Circuit (District) Court adjudging one guilty of contempt may be reviewed by the Circuit Court of Appeals. A person not a party to a suit before such Circuit (District) Court who has been adjudged guilty of contempt for violating an order of that court made in such suit may have such order reviewed by writ of error to the Circuit Court of Appeals. *Besette v. W. B. Conkey Co.*, 133 *Fed. R.* 165-166, 66 *C. C. A.* 291.

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A person not a party in an equity cause committed for contempt is entitled to a review of the order of committal upon a writ of error sued out before the final decree in the cause. *Butler v. Fairweather*, 91 *Fed. R.* 458-460, 33 *C. C. A.* 625.

A judgment of contempt rendered by a court in an equity suit is a judgment rendered in a criminal case, reviewable upon writ of error under the Act of Mar. 3, 1891 (sec. 128, Judicial Code), giving the Circuit Court of Appeals jurisdiction to review judgments in criminal cases (not capital). *In re Heinze*, 127 *Fed. R.* 96-98, 62 *C. C. A.* 96.

Held, that the cases of *Hayes v. Fisher*, 102 *U. S.* 121, 26 L. ed. 95, and *Ex parte Kearney*, 7 *Wheat.* 38, 5 L. ed. 391, are not applicable, those decisions being based upon the ground that the Supreme Court had no jurisdiction to review a judgment in a criminal case; such review in that court being authorized prior to 1891 upon a certificate of division of opinion between the judges of the Circuit Court. *Ib.* 98.

Held a writ of error not sued out within the six months after the entry of the judgment limited by the Act of Mar. 3, 1891, could not be reviewed in the Circuit Court of Appeals, notwithstanding the writ was allowed within that time. *Rutan v. Johnson*, 130 *Fed. R.* 109-110, 64 *C. C. A.* 443.

Held in the 8th Circuit (Judge Reed dissenting) that though a party has not applied for stay of execution within 42 days of entry of the judgment as allowed by sec. 987, *Rev. Stats. (U. S. Comp. Stat. 1901, p. 708)*, where the court entertains a motion for new trial during the term at which the judgment was entered a *supersedeas* may be obtained under sec. 1007, *Rev. Stats. (U. S. Comp. Stat. 1901, p. 714)*, by perfecting an appeal or writ of error within 60 days after the motion for new trial is disposed of. *Sanborn v. Bay*, 194 *Fed. R.* 37, 114 *C. C. A.* 57-60.

Where no allowance of interest was specially directed in the decree of the District Court and such decree is simply affirmed with costs by the Circuit Court of Appeals, no interest can be recovered under the decree of the Court of Appeals unless it modifies or amends its decree so as to include interest. *The Glenochil*, 128 *Fed. R.* 963-969.

An appeal in admiralty cannot be sustained in the name of a vessel. Only a human being or an aggregation of human beings, as an association or corporation, may bring an appeal or writ of error. *Steamboat Burns*, 9 *Wall.* 237-240, 19 L. ed. 620.

On motion to dismiss an appeal in admiralty before hearing, the libel and not the answer is to be looked to, since no replication being necessary in admiralty to put the case at issue, new facts set up in the answer are taken as denied by the libellant. *The W. J. Hingston*, 144 *Fed. R.* 560-562.

RULES
OF THE
UNITED STATES CIRCUIT COURT OF
APPEALS

The rule as it exists in the First Circuit is alone printed where common to all the circuits. Where a different rule exists in any circuit, the variance if substantial is shown by printing under the rule as it exists in the First Circuit the corresponding rule for each of the other circuits. Following the rules of the First Circuit are several rules adopted in a single circuit.

RULE I—*Name*

The court adopts "United States Circuit Court of Appeals for the First Circuit" as the title of the court.

[In the other circuits the word "First" preceding "Circuit" is "Second," "Third," "Fourth," "Fifth," "Sixth," "Seventh," "Eighth," and "Ninth," respectively.]

RULE II—*Seal*

The seal shall contain the words "United States" on the upper part of the outer edge; and the words "Circuit Court of Appeals" on the lower part of the outer edge, running from left to right; and the words "First Circuit" in two lines, in the centre, with a dash beneath; as follows: [SEAL.]

[In the other circuits the word "First" preceding "Circuit" and the word "First" on the seal, are "Second," "Third," "Fourth," "Fifth," "Sixth," "Seventh," "Eighth," and "Ninth," respectively.]

RULE III—*Terms and Sessions*

First Circuit—One term of this court shall be held annually at the city of Boston at ten o'clock in the forenoon on the first Tuesday of October. Stated sessions thereof shall be there held at the same hour on the first Tuesday of every month, and may be adjourned to such times and places as the court may from time to time designate. But, unless otherwise ordered, any adjournment shall be held to have been made to the first day of the next stated session.

Second Circuit—One term of this court shall be held annually at the city of New York, on the last Tuesday of October, and shall be adjourned to such times and places as the court may from time to time designate.

Third Circuit—The terms of this court shall commence and be held on the first Tuesday of March, and the first Tuesday of October, at the city of Philadelphia.

Fourth Circuit—(1) There shall be held in the city of Richmond, Virginia, three regular terms of this court; one on the first Tuesday of February, one on the first Tuesday of May, and one on the first Tuesday of November, in each year.

(2) Special sessions of this court shall be held at Richmond, Virginia, on the second Tuesday of every month of the year, except in those months in which regular terms of the court are held. During said sessions such orders, judgments or decrees as may be necessary concerning pending cases may be considered and disposed of, opinions in cases theretofore argued may be filed and decrees and judgments relating thereto entered, mandates issued, and any such further action taken as is authorized by the statute in such case made and provided.

(3) If at any such special session no judge shall be in attendance, the clerk shall adjourn the court until the next day, or to such time as the Senior Circuit Judge shall direct, and then in case no direction be made, to the next session or term of the court.

Fifth Circuit—A session of this court shall be held annually at the city of Atlanta, Georgia, on the first Monday in October, at the city of Montgomery, Alabama, on the third

Monday in October; at the city of Fort Worth, Texas, on the first Monday in November, at the city of New Orleans, Louisiana, on the third Monday in November, and shall be adjourned to such other time and place as the court may from time to time order and designate.

Sixth Circuit—(1) One term of this court shall be held annually on the Tuesday after the first Monday of October, and adjourned sessions on the Tuesday after the first Monday of each other month in the year except August and September. At the July session no causes will be heard, except upon special order of the court. A printed docket containing all cases docketed and not heard shall be made by the clerk for the October, January, and April sessions.

(2) All sessions of the court shall be held at Cincinnati unless otherwise specially ordered by the court.

(3) The court, on the first day of each session, except the July session, will begin calling the cases for argument in the order in which they stand on the docket, and proceed from day to day during the session in the same way.

(4) If the parties, or either of them, shall be ready when the case is called, the same will be heard, provided that the time within which to file briefs has expired. But a case may be continued once by agreement of counsel in open court or by stipulation filed in the clerk's office, to any session during the term. Subsequent continuances must be made by the court on motion for cause shown; and engagements of counsel in other courts will not be considered good cause for continuance.

(5) Each day's calendar shall consist of the six cases next in order after the case last submitted on the previous day, but the calendar will not include any case continued or passed by the court on stipulation of counsel before the adjournment of court on the previous day. The calendar for each day shall be exhibited in the clerk's office at the adjournment of court on the previous day. Counsel choosing to rely on the judgment of the clerk as to the probable time of hearing of any case, otherwise than as shown in the day's calendar above provided for, must do so at their own risk.

(6) Two or more cases involving the same question may, by leave of the court or by its order, be heard together, but they must be argued as one case.

(7) For good cause shown, on motion of either party, the court may advance any cause upon the docket to be heard at any session, even though the time permitted under the rules for the filing of briefs may not have expired at the day set for hearing. Such motion for the advancement of causes will be heard only upon five days' previous notice to opposing counsel.

Seventh Circuit—A term of this court shall be held annually at the city of Chicago on the first Tuesday in October, and continue until the first Tuesday in October of the succeeding year. Every term shall be adjourned to such time and places as the court may from time to time designate. Unless otherwise specially ordered, the court will hold at Chicago three sessions for the hearing of causes during each term, beginning on the first Tuesdays in October and January, respectively, and the second Tuesday in April.

Eighth Circuit—(1) Three terms of this court will be held annually, one at the city of St. Paul on the first Monday of May, one at the city of Denver on the first Monday of September, and one at the city of St. Louis on the first Monday of December.

(2) Cases from Minnesota, North Dakota, South Dakota, Nebraska, Iowa, Kansas, Missouri, Arkansas and Oklahoma in which transcripts to be printed under the supervision of the clerk of this court are filed, or transcripts printed before certification by the clerk of the lower court and proof by affidavit or admission that three copies of the printed transcripts have been served on the defendants in error or appellees, or their counsel, are filed on or before the 1st day of April, and cases from Colorado, Utah, Wyoming and New Mexico in which transcripts to be printed under the supervision of the clerk of this court are filed, or transcripts printed before certification by the clerk of the lower court and proof by affidavit or admission that three copies of the printed transcripts have been served on the defendants in error or appellees, or their counsel, and stipulations of the parties for their hearing at the

May Term in St. Paul are filed on or before the 1st day of April, and those only, will be heard at the succeeding May Term of the court in St. Paul.

(3) Cases from Colorado, Wyoming, Utah and New Mexico in which transcripts to be printed under the supervision of the clerk of this court are filed, or transcripts printed before certification by the clerk of the lower court and proof by affidavit or admission that three copies of the printed transcripts have been served on the defendants in error or appellees, or their counsel, are filed on or before the 1st day of July and cases from the remainder of the circuit in which transcripts to be printed under the supervision of the clerk of this court are filed, or transcripts printed before certification by the clerk of the lower court and proof by affidavit or admission that three copies of the printed transcripts have been served on the defendants in error or appellees, or their counsel, and stipulations of the parties for their hearing at the September Term in Denver are filed on or before the 1st day of July, and those only, will be heard at the succeeding September term in Denver.

(4) Cases from Minnesota, North Dakota, South Dakota, Nebraska, Iowa, Kansas, Missouri, Arkansas and Oklahoma in which transcripts to be printed under the supervision of the clerk of this court are filed, or transcripts printed before certification by the clerk of the lower court and proof by affidavit or admission that three copies of the printed transcripts have been served on the defendants in error or appellees, or their counsel, are filed on or before the 1st day of October, and cases from Colorado, Wyoming, Utah and New Mexico in which transcripts to be printed under the supervision of the clerk of this court are filed, or transcripts printed before certification by the clerk of the lower court and proof by affidavit or admission that three copies of the printed transcripts have been served on the defendants in error or appellees, or their counsel, and stipulations of the parties for their hearing at the December term in St. Louis are filed on or before the 1st day of October, and those only, will be heard at the succeeding December term in St. Louis.

(5) These terms of the court may be adjourned to such

times and places as the court may from time to time designate.

Ninth Circuit—One term of this court shall be held annually at the city of San Francisco on the first Monday of October, and shall be adjourned to such times and places as the court may from time to time designate.

See also Rule 36, page 349.

RULE IV—*Quorum*

First Circuit—(1) In the absence of a quorum on any day appointed for holding a term, or on any day to which the court is adjourned, any judge who attends shall adjourn the court from day to day; or, if no judge is present, the clerk shall so adjourn; and, in the absence of all the judges and the clerk, the marshal or his deputy shall so adjourn. But the court may, from time to time, as provided in Rule 3, enter orders directing an adjournment, or adjournments, for longer periods than from day to day, or *sine die*.

(2) Any judge attending when less than a quorum is present may make all necessary orders touching any suit, proceeding, or process depending in or returned to the court, preparatory to hearing, trial, or decision thereof.

Second, Third, Fourth, Fifth and Seventh Circuits—(1) If at any time a quorum does not attend on any day appointed for holding it, any judge who does attend may adjourn the court from time to time (or from place to place, as the rule reads in the Fourth Circuit) or in the absence of any judge the clerk may adjourn the court from day to day. If, during a term, after a quorum has assembled, less than that number attend on any day any judge attending may adjourn the court from day to day until there is a quorum, or may adjourn without day.

(2) Any judge attending when less than a quorum is present may make all necessary orders touching any suit, proceeding or process, depending on or returned to the court, preparatory to hearing, trial or decision thereof.

Sixth Circuit—If at any term a quorum does not attend on the day appointed for holding it, any judge who does attend may adjourn the court from time to time, or, in the absence

of any judge, the clerk may adjourn the court from day to day. If, during a term, after a quorum has assembled, less than that number attend on any day, any judge attending may adjourn the court from time to time until there is a quorum, or may adjourn without day; or, in the absence of any judge, the clerk may adjourn the court for successive intervals of one week until a judge attends.

Ninth Circuit—(1) If, at any term or session, a quorum does not attend on any day appointed for holding it, any judge who does attend may adjourn the court from time to time, or, in the absence of any judge, the clerk may adjourn the court from day to day. If, during a term, after a quorum has assembled, less than that number attend on any day, any judge attending may adjourn the court from day to day until there is a quorum or may adjourn without day.

(2) Any judge attending when less than a quorum is present may make all necessary orders touching any suit, proceeding, or process depending in or returned to the court, preparatory to hearing, trial, or decision thereof.

Decisions

Held, by the majority of the court in the *Fourth Circuit*, that three district judges regularly designated constituted a legal Circuit Court of Appeals under sec. 3 of the Act of Mar. 3, 1891. Pritchard, Circuit Judge, dissenting. *Peters v. Hanger*, 136 *Fed. R.* 181, 182.

RULE V—Clerk

(1) The clerk's office shall be kept at the place designated in the act creating the court at which a term shall be held annually.

(2) The clerk shall not practice, either as attorney or counsellor, in this court or in any other court while he shall continue to be clerk of this court.

(3) He shall, before he enters on the execution of his office, take an oath in the form prescribed by sec. 794, of the *Rev. Stats.*, and shall give bond in a sum to be fixed, and with sureties to be approved, by the court, faithfully to discharge the duties of his office and seasonably to record the de-

crees, judgments, and determinations of the court. A copy of such bond shall be entered on the journal of the court, and the bond shall be deposited for safe-keeping as the court may direct.

(4) He shall not permit any original record or paper to be taken from the court room or from the office, without an order from the court.

Section 1 of this rule in the *Second Circuit* provides that the clerk's office shall be kept in the city of New York; in the *Third Circuit* shall be kept in the city of Philadelphia; in the *Fourth Circuit* shall be kept in the city of Richmond; in the *Fifth Circuit* shall be kept in the city of New Orleans; in the *Sixth Circuit* shall be kept in the City of Cincinnati; in the *Seventh Circuit* shall be kept in the city of Chicago; in the *Eighth Circuit* shall be kept in the city of St. Louis and in the *Ninth Circuit* shall be kept in the city of San Francisco.

By sec. 3 of this rule in the *Fifth Circuit* it is provided that the bonds, instead of being in a sum to be fixed shall be in the sum of ten thousand dollars (\$10,000); in the *Ninth Circuit*, Clause 4, there is added the words "except as provided in Rule 23."

In the *Seventh Circuit* to sec. 1 of this rule is added these words:

(5) All fees collected by the clerk which are not properly taxable as costs in any case, and which are not by law required to be by him deposited in the Treasury of the United States shall constitute a fund to be expended by the clerk, under the direction of the court, in the purchase of law books for the library of the court.

(6) The clerk shall keep an accurate and itemized account of all moneys received by him officially, including costs and fees in cases in the court and fees and moneys collected on any account whatever, and shall deposit the same as received daily to his credit as clerk, and separately from all individual accounts in a national bank designated by the senior judge, and at the end of each month and whenever required by the court or senior judge, shall submit to the senior judge a detailed report showing by items all moneys received and all moneys paid out during the month,

and the total balances on hand from each and all sources of receipt; each report shall be accompanied by a statement, over the signature of the cashier or other officer of the bank in which the deposit is kept, of the amount in the bank to the credit of the clerk at the close of the last day included in the report.

RULE VI—*Marshal and Other Officers*

First Circuit—The marshal shall be in attendance during the sessions of the court with such number of bailiffs, messengers, and other officers as the court may from time to time order.

Second Circuit—(1) Every marshal and deputy marshal shall, before he enters on the duties of his appointment, take an oath in the form prescribed by sec. 782, *Rev. Stats.* (*U. S. Comp. Stats.* 1901, p. 578), and the marshal shall, before he enters on the duties of his office, give bond in a sum to be fixed, and with sureties to be approved, by the court, for the faithful performance of said duties by himself and his deputies. Said bond shall be filed and recorded in the office of the clerk of the court.

(2) The marshal and crier shall be in attendance during the sessions of the court, with such number of bailiffs and messengers as the court may, from time to time, order.

Third, Fourth, Fifth, Eighth, and Ninth Circuits—The marshal and crier shall be in attendance during the sessions of the court, with such number of bailiffs and messengers as the court may, from time to time, order. In the *Eighth Circuit* the words “of the district in which a term or session of the court is held” are inserted.

Seventh Circuit—(1) The crier and bailiffs of the court shall, before they enter on their duties, take an oath in the form prescribed by sec. 782, *Rev. Stats.* (*U. S. Comp. Stats.* 1901, p. 578).

(2) The marshal and crier shall be in attendance during the sessions of the court, with such number of bailiffs and messengers as the court may, from time to time, order.

RULE VII—*Attorneys and Counsellors*

First and Second Circuits—All attorneys and counsellors admitted to practice in the Supreme Court of the United States, or in any Circuit (District) Court of the United States, shall become attorneys and counsellors in this court on taking an oath or affirmation in the form prescribed by Rule 2 of the Supreme Court of the United States and on subscribing the roll; but no fee shall be charged therefor.

Third Circuit—All attorneys and counsellors admitted to practice in the Supreme Court of the United States or in any Circuit (District) Court of the United States shall become attorneys and counsellors in this court, on taking an oath or affirmation in the form prescribed by Rule 2 of the Supreme Court of the United States and on subscribing the roll; but no fee shall be charged therefor, and all attorneys and counsellors of the Circuit (District) Courts of the United States for the Third Circuit shall be attorneys and counsellors of this court without taking any further oath.

Fourth Circuit—All attorneys and counsellors admitted to practice in the Supreme Court of the United States or in any District Court of the United States shall become attorneys and counsellors in this court on taking an oath or affirmation in the form prescribed by Rule 2 of the Supreme Court of the United States, subscribing the roll, and on payment of a fee of \$5.00.

Fifth Circuit—All attorneys and counsellors admitted to practice in the Supreme Court of the United States, or in any Circuit (District) Court of the United States, upon filing a certificate of such admission with the clerk of this court, and upon taking an oath or affirmation in the following form, viz:

“I, ———, do solemnly swear (or affirm) that I will demean myself as an attorney and counsellor of this court uprightly and according to law, and that I will support the Constitution of the United States,” (a copy of which shall also be filed with the clerk), shall become attorneys and counsellors of this court; provided, however, that any attorney or counsellor eligible to admission as an attorney and counsellor of this court may be admitted to practice,

on motion, in open court, upon taking the oath or affirmation as prescribed, and subscribing the roll. On each admission the clerk will collect ten dollars (\$10.00) to be applied to the purchase of law books for the use of the court and bar.

Sixth Circuit—An attorney and counsellor admitted to practice and in good standing in the Supreme Court of the United States or in a District Court of the United States or in the court of last resort in the State of his residence may become attorney and counsellor in this court on taking an oath or affirmation as prescribed by Rule 2 of the Supreme Court of the United States, and upon subscribing the roll.

The fee for such admission shall be ten dollars (\$10.00).

Every person taking the oath and paying such fee shall be entitled to a certificate of his admission, signed by the clerk.

Seventh Circuit—All attorneys and counsellors admitted to practice in the Supreme Court of the United States or in any Circuit (District) Court of the United States or in the Supreme Court of a State in this circuit may become attorneys and counsellors in this court on taking an oath or affirmation in the form prescribed by Rule 2 of the Supreme Court of the United States, and on subscribing the roll.

Eighth Circuit—(1) All attorneys and counsellors admitted to practice in the Supreme Court of the United States or in any Circuit Court or District Court of the United States, or in the Supreme Court of any State in this circuit, may, upon motion of some member of the bar of this court, be admitted as attorneys and counsellors in this court on taking an oath or affirmation in the form prescribed by Rule 2 of the Supreme Court of the United States, and on subscribing the roll; but no fee shall be charged therefor.

(2) And any attorney and counsellor admitted to practice in the Supreme Court of the United States or in the Supreme Court of any State, or in the District or Circuit Courts of the United States for this circuit, may be admitted by order of this court to practice and enrolled as an attorney and counsellor of this court, 30 days after he furnishes to the clerk

RULE VII—*Attorneys and Counsellors*

First and Second Circuits—All attorneys and counsellors admitted to practice in the Supreme Court of the United States, or in any Circuit (District) Court of the United States, shall become attorneys and counsellors in this court on taking an oath or affirmation in the form prescribed by Rule 2 of the Supreme Court of the United States and on subscribing the roll; but no fee shall be charged therefor.

Third Circuit—All attorneys and counsellors admitted to practice in the Supreme Court of the United States or in any Circuit (District) Court of the United States shall become attorneys and counsellors in this court, on taking an oath or affirmation in the form prescribed by Rule 2 of the Supreme Court of the United States and on subscribing the roll; but no fee shall be charged therefor, and all attorneys and counsellors of the Circuit (District) Courts of the United States for the Third Circuit shall be attorneys and counsellors of this court without taking any further oath.

Fourth Circuit—All attorneys and counsellors admitted to practice in the Supreme Court of the United States or in any District Court of the United States shall become attorneys and counsellors in this court on taking an oath or affirmation in the form prescribed by Rule 2 of the Supreme Court of the United States, subscribing the roll, and on payment of a fee of \$5.00.

Fifth Circuit—All attorneys and counsellors admitted to practice in the Supreme Court of the United States, or in any Circuit (District) Court of the United States, upon filing a certificate of such admission with the clerk of this court, and upon taking an oath or affirmation in the following form, viz:

“I, ———, do solemnly swear (or affirm) that I will demean myself as an attorney and counsellor of this court uprightly and according to law, and that I will support the Constitution of the United States,” (a copy of which shall also be filed with the clerk), shall become attorneys and counsellors of this court; provided, however, that any attorney or counsellor eligible to admission as an attorney and counsellor of this court may be admitted to practice,

on motion, in open court, upon taking the oath or affirmation as prescribed, and subscribing the roll. On each admission the clerk will collect ten dollars (\$10.00) to be applied to the purchase of law books for the use of the court and bar.

Sixth Circuit—An attorney and counsellor admitted to practice and in good standing in the Supreme Court of the United States or in a District Court of the United States or in the court of last resort in the State of his residence may become attorney and counsellor in this court on taking an oath or affirmation as prescribed by Rule 2 of the Supreme Court of the United States, and upon subscribing the roll.

The fee for such admission shall be ten dollars (\$10.00).

Every person taking the oath and paying such fee shall be entitled to a certificate of his admission, signed by the clerk.

Seventh Circuit—All attorneys and counsellors admitted to practice in the Supreme Court of the United States or in any Circuit (District) Court of the United States or in the Supreme Court of a State in this circuit may become attorneys and counsellors in this court on taking an oath or affirmation in the form prescribed by Rule 2 of the Supreme Court of the United States, and on subscribing the roll.

Eighth Circuit—(1) All attorneys and counsellors admitted to practice in the Supreme Court of the United States or in any Circuit Court or District Court of the United States, or in the Supreme Court of any State in this circuit, may, upon motion of some member of the bar of this court, be admitted as attorneys and counsellors in this court on taking an oath or affirmation in the form prescribed by Rule 2 of the Supreme Court of the United States, and on subscribing the roll; but no fee shall be charged therefor.

(2) And any attorney and counsellor admitted to practice in the Supreme Court of the United States or in the Supreme Court of any State, or in the District or Circuit Courts of the United States for this circuit, may be admitted by order of this court to practice and enrolled as an attorney and counsellor of this court, 30 days after he furnishes to the clerk

of this court a certificate of a clerk or judge of any one of the courts named that the applicant is an attorney of any one of said courts, and upon subscribing and forwarding to the clerk the following oath: "I do solemnly swear (or affirm) that I will demean myself as an attorney and counsellor of the Circuit Court of Appeals for the Eighth Circuit, uprightly and according to law; and that I will support the Constitution of the United States. So help me God."

Ninth Circuit—All attorneys admitted to practice in the Supreme Court of the United States or in any District Court of the Ninth Circuit shall be deemed attorneys of the Circuit Court of Appeals for the Ninth Circuit; but such attorneys, on or before their first appearance in open court in said court shall take an oath or affirmation, in the form prescribed by Rule 2 of the Supreme Court of the United States and subscribe the roll of attorneys. All other persons who have been admitted to practice in the highest court of any State or Territory upon presenting satisfactory evidence of good moral character and fair professional standing, may be admitted to practice in said court upon taking the oath so prescribed and subscribing the roll of attorneys.¹

RULE VIII—*Practice*

The practice shall be the same as in the Supreme Court of the United States, as far as the same shall be applicable.

Decisions

On application to take new evidence in an admiralty cause some satisfactory excuse for failure to examine witnesses in the court below must be presented to the appellate court. A mere affidavit that the testimony is necessary is not sufficient; the affidavit must show that the evidence was discovered too late, or that the witnesses, having been subpoenaed, failed to appear and could not be attached, or a like excuse. *The Wabey v. Atkins*, 10 *Wall.* 419, 420, 19 L. ed. 963, Dec. T., 1870.

There can be no substantial amendment of admiralty pleadings in the appellate court. If the pleadings or evidence in such causes are so defective that no decree can be founded on them, and the case appears

¹ Briefs signed by counsel who are not members of the bar of this court or fully qualified under the provisions of this rule will not be considered by the court.

Appearance cannot be entered unless counsel is a member of the bar of this court, or of the Supreme Court of the United States or of a District Court within the Ninth Circuit.

on motion, in open court, upon taking the oath or affirmation as prescribed, and subscribing the roll. On each admission the clerk will collect ten dollars (\$10.00) to be applied to the purchase of law books for the use of the court and bar.

Sixth Circuit—An attorney and counsellor admitted to practice and in good standing in the Supreme Court of the United States or in a District Court of the United States or in the court of last resort in the State of his residence may become attorney and counsellor in this court on taking an oath or affirmation as prescribed by Rule 2 of the Supreme Court of the United States, and upon subscribing the roll.

The fee for such admission shall be ten dollars (\$10.00).

Every person taking the oath and paying such fee shall be entitled to a certificate of his admission, signed by the clerk.

Seventh Circuit—All attorneys and counsellors admitted to practice in the Supreme Court of the United States or in any Circuit (District) Court of the United States or in the Supreme Court of a State in this circuit may become attorneys and counsellors in this court on taking an oath or affirmation in the form prescribed by Rule 2 of the Supreme Court of the United States, and on subscribing the roll.

Eighth Circuit—(1) All attorneys and counsellors admitted to practice in the Supreme Court of the United States or in any Circuit Court or District Court of the United States, or in the Supreme Court of any State in this circuit, may, upon motion of some member of the bar of this court, be admitted as attorneys and counsellors in this court on taking an oath or affirmation in the form prescribed by Rule 2 of the Supreme Court of the United States, and on subscribing the roll; but no fee shall be charged therefor.

(2) And any attorney and counsellor admitted to practice in the Supreme Court of the United States or in the Supreme Court of any State, or in the District or Circuit Courts of the United States for this circuit, may be admitted by order of this court to practice and enrolled as an attorney and counsellor of this court, 30 days after he furnishes to the clerk

of this court a certificate of a clerk or judge of any one of the courts named that the applicant is an attorney of any one of said courts, and upon subscribing and forwarding to the clerk the following oath: "I do solemnly swear (or affirm) that I will demean myself as an attorney and counsellor of the Circuit Court of Appeals for the Eighth Circuit, uprightly and according to law; and that I will support the Constitution of the United States. So help me God."

Ninth Circuit—All attorneys admitted to practice in the Supreme Court of the United States or in any District Court of the Ninth Circuit shall be deemed attorneys of the Circuit Court of Appeals for the Ninth Circuit; but such attorneys, on or before their first appearance in open court in said court shall take an oath or affirmation, in the form prescribed by Rule 2 of the Supreme Court of the United States and subscribe the roll of attorneys. All other persons who have been admitted to practice in the highest court of any State or Territory upon presenting satisfactory evidence of good moral character and fair professional standing, may be admitted to practice in said court upon taking the oath so prescribed and subscribing the roll of attorneys.¹

RULE VIII—*Practice*

The practice shall be the same as in the Supreme Court of the United States, as far as the same shall be applicable.

Decisions

On application to take new evidence in an admiralty cause some satisfactory excuse for failure to examine witnesses in the court below must be presented to the appellate court. A mere affidavit that the testimony is necessary is not sufficient; the affidavit must show that the evidence was discovered too late, or that the witnesses, having been subpcœnaed, failed to appear and could not be attached, or a like excuse. *The Wabey v. Atkins*, 10 *Wall.* 419, 420, 19 L. ed. 963, Dec. T., 1870.

There can be no substantial amendment of admiralty pleadings in the appellate court. If the pleadings or evidence in such causes are so defective that no decree can be founded on them, and the case appears

¹ Briefs signed by counsel who are not members of the bar of this court or fully qualified under the provisions of this rule will not be considered by the court.

Appearance cannot be entered unless counsel is a member of the bar of this court, or of the Supreme Court of the United States or of a District Court within the Ninth Circuit.

to have merit, the court will reverse the decree and remand the cause to the court below with directions to permit amendments and further proofs. *Ib.* 420.

Upon affidavit filed, setting out that it had been discovered since the decree appealed from that the witnesses had been corrupted by an agreement of one of the parties, a commission was ordered to take further testimony upon interrogatories, with notice to the other party, and leave to file cross-interrogatories. *Steamer Western Metropolis v. Low*, 12 *Wall.* 389, 20 *L. ed.* 394, *L. c. T.*, 1870.

Since the Act of Mar. 3, 1891, an appeal in admiralty comes to the Circuit Court of Appeals, but the practice is not like that formerly existing in the Circuit Courts under Admiralty Rule 49. New evidence cannot be taken by deposition *de bene esse*, but only by commission under Supreme Court Rule 12, which does not issue as of course but upon a showing that the testimony sought is material and a satisfactory excuse for failure to take the evidence in the court below. *The Bechee Deene*, 55 *Fed. R.* 526-528, 5 *C. C. A.* 208.

The laws of any State in the Union whether depending upon statutes or upon judicial opinions, is a matter of which the courts of the United States take judicial notice without plea or proof. *Lamar v. Micou*, 114 *U. S.* 218-223, 29 *L. ed.* 94.

An appeal in equity involves a trial *de novo* in the appellate court and entitles the appellant to a just decree. *Beane v. Garlington*, 92 *U. S.* 1-8, 23 *L. ed.* 521.

Though it has no power to find the facts in a case, yet where the correct construction of a contract is determined by a question of law, and the trial court's finding of fact arose out of an erroneous construction of a contract, the Circuit Court of Appeals has power to render a judgment without ordering a new trial in the court below. *Bayne v. United States*, 195 *Fed. R.* 236-240, 115 *C. C. A.* 188.

A remittitur may be entered and the judgment modified and affirmed only where it appears from the record that certain elements of the verdict might have been affected by the error and the remainder of the verdict could not have been so affected. *Cheesborough v. Woodworth*, 195 *Fed. R.* 875-887, 116 *C. C. A.* 465.

The dismissal of a cross-bill is not appealable under sec. 128, *Judicial Code*, until final decree in the principal suit. *Winters v. Ethell*, 132 *U. S.* 207-210, 33 *L. ed.* 339.

Held: if the Circuit Court should have dismissed the cause of its own motion because without jurisdiction, the Supreme Court would reverse the cause with directions to dismiss the cause at the costs of the plain-

tiff in error. *Williams v. Nottawa*, 104 *U. S.* 209-213, 26 L. ed. 720, Oct. T., 1881.

A writ of error sued out of the Supreme Court, on the ground that the trial court had no jurisdiction, does not prevent the Court of Appeals from issuing a writ of error to review an order in the cause made after a judgment therein denying a new trial, which under the State practice (declared in 106 *U. S.* 86 binding on a Federal court) is a matter of right. In such case it is not material that the writ of error upon the question of jurisdiction has issued to the Supreme Court. *Shreve v. Cheesman*, 69 *Fed. R.* 785-787, 16 *C. C. A.* 413.

Under sec. 10 of Act of Mar. 3, 1891, establishing the Circuit Court of Appeals that court had power, like that possessed by the Supreme Court, to reverse the judgment below, and permit the plaintiff to apply to it for the allowance of an amendment. *Van Doren v. Pennsylvania R. Co.*, 93 *Fed. R.* 260-272, 35 *C. C. A.* 282.

In cases of doubt whether an appeal or a writ of error is the proper mode of obtaining a review the appellant may take an appeal and also sue out a writ of error, and the appellate court will review the proceedings below in accordance with the rules of that method applicable to the nature of the case before it. *Hooven, etc., Co. v. John Featherstone's Sons*, 111 *Fed. R.* 81-86, 49 *C. C. A.* 229, citing *Hurt v. Hollingsworth*, 100 *U. S.* 100-102, 25 L. ed. 569.

The practice of taking an appeal and a writ of error to review the same adjudication is not only permissible but commendable in cases in which counsel have just reason to doubt which is the proper proceeding to give jurisdiction to the appellate court. In such cases it is not necessary to docket the cause twice and there should be but one record, as there is but one case in the appellate court. In such cases the reviewing court will consider both proceedings, will dismiss that one which is ineffective, and will review the rulings of the court below in accordance with the rules of the method applicable to the nature of the case before it. *Lockman v. Lang*, 132 *Fed. R.* 3, 65 *C. C. A.* 621.

The rules requiring all parties against whom a judgment or decree is rendered in the absence of severance to join in suing out a writ of error or prosecuting an appeal therefrom, has application only to a joint judgment or decree against such parties; it has no application to separate judgments or decrees against such parties, though rendered at the same time and contained in the same entry. *Love v. Export Storage Co.*, 143 *Fed. R.* 1-11, 74 *C. C. A.* 155.

The rule is not applicable where a party claiming to be aggrieved, although he is one of several parties against whom the judgment is

rendered, yet alone represents some distinct and substantial subject-matter in which the others have no concern, or are only indirectly concerned, by reason of the allowance or negation of such claim. *Ayres v. Polsdorfer*, 105 *Fed. R.* 737-739, 45 *C. C. A.* 24.

Where the order or decree appealed from affects only some of the parties before the trial court, the citation need not be served upon those not affected and who have no right to be heard in the appellate court. *Coler v. Allen*, 114 *Fed. R.* 609-610, 52 *C. C. A.* 389.

Sec. 1011, *Rev. Stats., U. S. Comp. Stats.* 1901, p. 715, providing that there shall be no reversal in the Supreme Court or Circuit Courts upon a writ of error, for any error of fact, is applicable to the Circuit Court of Appeals. *Hall v. Houghton & Upp. Mer. Co.*, 60 *Fed. R.* 350, 351, 8 *C. C. A.* 661.

An appellate court may avail itself of authentic evidence outside of the record before it, of matters occurring since the decree of the trial court, when such course is necessary to prevent a miscarriage of justice, to avoid a useless circuitry of proceedings, to preserve jurisdiction lawfully acquired, or to protect itself from imposition or further prosecution of litigation, where the controversy between the parties has been settled or for other reasons has ceased to exist. *Ridge v. Manker*, 132 *Fed. R.* 599-601, 67 *C. C. A.* 596.

RULE IX—*Process*

All process of this court shall be in the name of the President of the United States, and shall be in like form and tested in the same manner as process of the Supreme Court.

Decisions

Under sec. 1004, *Rev. Stats., U. S. Comp. Stats.* 1901, p. 703, as amended by the Act of Jan. 22, 1912 (37 *Stat.* 54), *Held* the writ of error may be issued by the clerk of the court to which it is returnable or by the clerk of the court whose judgment is to be reviewed.

The clerk of the District Court may not issue a writ of error from the Supreme Court to review a judgment of the Circuit Court of Appeals. *Re Issuing Writs of Error*, 199 *Fed.* 115.

RULE X—*Bill of Exceptions*

The judges of the (Circuit and) District Courts shall not allow any bill of exceptions which shall contain the charge of the court at large ^{Charge at large not to set out.} to the jury in trials at common law upon any general ex-

ception to the whole of such charge. But the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts, and those matters of law, and those only, shall be inserted in the bill of exceptions and allowed by the court.

In the *Second Circuit* the rule reads:

“The judges of the District Court shall not allow any bill of exceptions unless the same contain the whole charge of the court to the jury. No general exception to the whole of such charge shall be allowed; but the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts.”

In the *Third Circuit* the rule reads:

(1) The judges of the Circuit and District Courts shall not allow any general exception to the whole of the charge to the jury in a civil or a criminal trial at common law, nor shall a series of exceptions be allowed which produces the same result. But the party excepting shall state distinctly and separately the several matters in such charge to which he excepts, and only such matters shall be included in the bill of exceptions and allowed by the court. Exceptions to the charge or to the judge's action upon the requests for instruction shall be taken immediately on the conclusion of the charge before the jury retire, shall be specified in writing or dictated to the stenographer, and shall be specific and not general.

(2) Exceptions to the admission or rejection of evidence shall be specific and not general, and the bill of exceptions to such admission or rejection shall contain only so much of the evidence admitted or offered and rejected as is necessary for the presentation and decision of the questions saved for review. Unless there be saved a question which requires the consideration of all the evidence, a bill of exceptions containing all of it shall not be allowed.

In the *Fourth Circuit*, there is added to the rule as printed, in the First Circuit the following:

(2) Only as much of the evidence shall be embraced in a bill of exceptions as may be necessary to present clearly the questions of law involved in the rulings to which exceptions

are reserved, and such evidence as is embraced therein shall be set forth in condensed and narrative form, save as a proper understanding of the questions presented may require that parts of it be set forth otherwise.

In the *Sixth Circuit* Rule X is as follows:

(1) The assignments of error required by Rule 11 shall be filed at or before the settling of the bill of exceptions. The evidence in a bill of exceptions shall not be set forth in full, but shall be stated in simple and condensed form, all parts not essential to the decision of some one of the questions presented by the assignments of error being omitted, and the testimony of witnesses being stated only in narrative form, save that, if either party desires it and the judge so directs, any part of the testimony shall be reproduced in the exact words of the witness.

(2) No general exception to the whole of any charge to a jury on trials at law shall be allowed in any bill of exceptions. Exceptions to a charge, in order to be allowed in a bill of exceptions, must be taken before the jury retires and must state distinctly the several matters of law to which exception is taken. In cases where exception is taken to part of a charge, and such exception may be affected by other parts or by the charge as a whole, the entire charge shall be included in the bill of exceptions.

In the *Seventh Circuit* the rule contains the following additions:

(2) A bill of exceptions shall contain of the evidence only such a statement as is necessary for the presentation and decision of questions Not to contain all the evidence. saved for review, and unless there be saved a question which requires the consideration of all the evidence, a bill of exceptions containing all the evidence shall not be allowed.

(3) No document shall be copied more than once in a bill of exceptions or in a transcript of the record of the case, but instead there shall be inserted a reference to the one Documents to appear at length only once.—Motions for new trial not set out. copy set out. A motion for a new trial and orders and entries relating thereto shall not be set out in the transcript

unless required by written præcipe, of which a copy shall also be set out.

(4) The cost of unnecessary matter in the bill of exceptions or transcript or in the printed record shall not be recovered of the appellee or defendant in error, and in its discretion the court will in case of dispute appoint a referee to determine and report what was necessary therein, and will tax the cost of the reference as shall seem just.

Costs for unnecessary matter.

Decisions

The provisions of sec. 914, *Rev. Stats., U. S. Comp. Stats.* 1901, p. 684, do not extend to the means of revising a decision made in a Federal court.

Proceedings to remove a case by writ of error from one Federal court to another is matter to be regulated exclusively by Acts of Congress, or when they are silent, by methods derived from the common law, from ancient English statutes, or from the rules and practice of the courts of the United States. *Chateaugay Iron Co., Petitioner*, 128 *U. S.* 544–555, 32 *L. ed.* 508.

Sec. 953, *Rev. Stats., U. S. Comp. Stats.* 1901, p. 696, is the only regulation made by Congress as to bills of exceptions, providing that they shall be sufficiently authenticated by the signature of the presiding judge without any seal. *Ib.* 555.

The rules of practice and statutes governing State courts do not apply to bills of exception in the United States courts. *Whalen v. Sheridan*, 5 *Fed. R.* 436.

Unless control of the court over the case has been reserved by a standing rule of the court or by special order or is exercised by consent of the parties, its authority after the term at which the judgment is rendered to allow a bill of exceptions then first presented, or to amend a bill of exceptions already allowed and filed is at an end; though there may be circumstances not resulting from the laches of the parties which would avail to relax the rule, which is not ironclad. *Western Dredging & Imp. Co. v. Heldmaier*, 116 *Fed. R.* 179–182, 53 *C. C. A.* 625.

When, during the term at which a judgment is rendered, it is proposed to allow time beyond the term for the filing of a bill of exceptions, a notation of the fact should be made upon the docket or entered in the order book. When, after the term the bill is presented for signature, it should contain an explicit statement of the extension, to establish that the signing and filing are within the time allowed, or if a waiver

of the time is to be asserted, a distinct statement of the fact of consent by counsel or party present at the time of signing, or a written agreement endorsed upon or attached to the bill, showing that consent. Under no ordinary circumstances, if at all, will affidavits be received to show such consent,—certainly not when that fact is disputed. *Reliable I. & B. Co. v. Stahl*, 102 *Fed. R.* 590–593, 42 *C. C. A.* 522.

The signing of a bill of exceptions after the expiration of the term at which the judgment was rendered is lawful if done by consent of the parties given during that term. *Waldron v. Waldron*, 156 *U. S.* 361–378, 39 *L. ed.* 453.

The duty of seasonably preparing and tendering a bill of exceptions belongs to the excepting party; the trial court has only to consider whether the bill tendered is in due time, in legal form, and conformable to the truth; the duty of a court of error is limited to determining the validity of exceptions duly tendered and allowed. Any fault or omission in framing or tendering a bill of exceptions, being the act of the party and not of the court, cannot be amended at a subsequent term. *Michigan Ins. Bank v. Eldred*, 143 *U. S.* 293–298, 34 *L. ed.* 162.

It is not a sufficient excuse for delay in filing a bill of exceptions that the party is without means, or pecuniarily embarrassed. *Whalen v. Sheridan*, 5 *Fed. R.* 436.

Where the exceptions are taken, noted by the judge and reduced to writing at the trial, the court may enlarge the time to make, file, and serve a bill of exceptions over that previously allowed by an order in term, although the trial and judgment term has expired. *Talbot v. Press Pub. Co.*, 80 *Fed. R.* 567–568.

The order enlarging the time should be made *nunc pro tunc*, as of a time within the time originally allowed. *Ib.*

An order enlarging the time for filing the record (under Rule 16), made after the expiration of the time allowed in a prior order, *Held*, ineffectual. *West v. Irwin*, 54 *Fed. R.* 419–420, 4 *C. C. A.* 401.

A rule of court adopted by a Circuit Court, fixing the time within which bills of exception are to be presented, allowed or settled, or certified to, by the trial judge, are merely directory and may be dispensed with in the discretion of the judge, provided always the exceptions themselves are seasonably taken and reserved. *Southern Pacific Co. v. Johnson*, 69 *Fed. R.* 559–562, 16 *C. C. A.* 317.

Under ordinary circumstances the exercise of this discretion is limited to the same term in which the judgment is rendered. *Preble v. Bates*, 40 *Fed. R.* 745–746.

The true rule is that the power to reduce exceptions taken at the trial to form and have them signed and filed, is confined to a time not later than the term at which the judgment was rendered. From this rule there should be no exceptions without an express order of the court during the term, or consent of the parties, save under very extraordinary circumstances. *Muller v. Ehlers*, 91 U. S. 249-251, 23 L. ed. 319.

Where a rule of court requires the presentation of the bill of exceptions for signature within five days after the close of the trial, the judge may depart from the rule in order to effectuate justice and sign a bill presented during the term at which a cause was tried, but more than five days after the verdict was rendered. *Hunnicutt v. Peyton*, 102 U. S. 333-353, 26 L. ed. 113.

Held, the order need not be signed *nunc pro tunc*, its date being held of no importance. *Ib.* 357.

Where it appears that the exceptions were taken at the trial and that by express order time was allowed for signing the same after the completion of the term, and delay was had in reliance on this express order of the court postponing the signing, if the exceptions were signed within the term to which the continuances extended, they are seasonably signed. *Ward v. Cochran*, 150 U. S. 597-603, 37 L. ed. 1195.

Prior to the expiration of the time allowed for presenting the bill of exceptions an order may be made extending the time through and until the end of the next succeeding term, and where special reason therefor existed a judgment (not, however, in cases where there has been a trial by jury) may be re-entered in the following term, to enlarge the time for taking an appeal. *United States v. First National Bank*, 86 Fed. R. 861-863.

A bill of exceptions cannot be signed after the lapse of the term at which the judgment is entered, unless it affirmatively appears that it was so signed and filed by consent of the parties, or in compliance with the standing rule of court, or an order made and entered of record at the trial term, or unless it appears that the court's control over the record was preserved during the succeeding term by the pendency of a motion for a new trial. *Missouri, K. & T. Ry. Co. v. Russell*, 60 Fed. R. 501-503, 9 C. C. A. 108.

Exceptions to be of any avail must be taken at the trial. *United States v. Carey*, 110 U. S. 51-52, 28 L. ed. 67.

The record must show expressly or impliedly that the exception was taken and reserved by the party at the trial, but it need not be drawn

out and signed by the judge before the jury retire from the bar. *Stanton v. Embrey*, 93 *U. S.* 548-555, 23 *L. ed.* 983.

It is always allowable if the exception is seasonably taken and reserved that it may afterwards be put in form and filed in the case by direction of the judge. *Ib.* 556.

Error based upon the charge or instructions of the court will not be considered where the bill of exceptions fails to show affirmatively the time the exceptions were taken thereto was "while the jury was at the bar." *Stone v. United States*, 64 *Fed. R.* 667-677, 12 *C. C. A.* 451.

Although the record shows that the practice of the trial court was to refuse to allow exceptions to be taken in the presence of the jury, exceptions not so taken will not be considered, if the record fails to show a request made to take the same before the jury retired. *Western Union Tel. Co. v. Baker*, 85 *Fed. R.* 690-691, 29 *C. C. A.* 392.

The rule that exceptions to the charge of the court and to other instructions given or refused or any other rulings of the court must be taken before the jury retires to deliberate on their verdict, is not merely formal or technical, but absolutely essential. *Merchants Ex. Bank v. M'Graw*, 76 *Fed. R.* 930-936, 22 *C. C. A.* 622.

Where the jury returned into court and received further instructions, given in the absence of counsel, it will be sufficient if exceptions thereto are taken at the earliest opportunity. *Ib.* 936.

Although there appears in the transcript a copy of a charge to the jury, marked by the clerk as filed, it does not become a part of the record unless incorporated in the bill of exceptions. *Clune v. United States*, 159 *U. S.* 590-593, 40 *L. ed.* 269.

A statement made and filed in aid of a motion for a new trial, containing what purports so be all the exceptions taken and allowed on the trial, with all the evidence relating to the same, settled and allowed by the trial judge in due time, may be treated as a bill of exceptions. *Alexander v. United States*, 57 *Fed. R.* 828-831, 6 *C. C. A.* 602.

Upon a motion in the appellate court to enter an order authorizing the trial court to amend the bill of exceptions, so as to show whether it contained all the evidence produced on the trial, or not, the motion was denied, the court holding that if by mistake the record speaks an untruth, even after the lapse of the term at which the judgment has been rendered and after the record in the case has been removed to the appellate court, the trial court has power to correct it; and, further, that if the trial court has no power to amend a bill of exceptions after the lapse of the term at which the judgment was rendered and the

bill of exceptions signed, no order of the appellate court would confer such authority. *Rollins v. Board of Commissioners*, 78 *Fed. R.* 741-742, 24 *C. C. A.* 298.

It is within the power of the trial court, during the term, to correct any omissions in the bill of exceptions, by amendment. Even subsequent to the adjournment of the term the court may, on application, correct the record so as to show the truth of what actually occurred, and correct any error or omission of its officers. *Whiting v. Equitable Life Assurance*, 69 *Fed. R.* 197, 8 *C. C. A.* 558.

Where the record has been corrected in the trial court during the term, the appellate court may allow the bill of exceptions to be amended to show such action. *Ib.* 199.

The amendment of a bill of exceptions made long after the close of the trial term and after the end of the time for settling the bill as fixed by the order of the court, especially after a writ of error has been allowed and the case removed from the trial court, is unauthorized and void. *Honey v. Chicago, B. & Q. Ry. Co.*, 82 *Fed. R.* 773-774, 27 *C. C. A.* 262.

A bill of exceptions regular in form and complete in all other respects, save that it failed to state that it contained all of the testimony given on trial, which omission is due to an oversight of counsel, and not of the judge, or neglect of the clerk, may not be amended after the close of the term, and the end of the time fixed for settling the bill, by adding a statement that it contained all the evidence. *Ib.*

When the record itself discloses the ground upon which the plaintiff in error seeks a reversal of the judgment, the bill of exceptions is not necessary. *St. Paul, M. & M. Ry. Co. v. Drake*, 72 *Fed. R.* 945-947, 19 *C. C. A.* 252.

The finding and statement of facts by a District Court in an equity case is not conclusive in an appellate court under sec. 1012, *Rev. Stats.* (*U. S. Comp. Stat.*, 1901, 716), providing that appeals shall be subject to the same rules prescribed for writs of error. *Hendrix v. Perkins*, 123 *Fed. R.* 268-269, 59 *C. C. A.* 266.

Under sec. 700, *Rev. Stats.*, *U. S. Comp. Stats.* 1901, p. 570, providing that where there is a special finding of facts the review on appeal may extend to the sufficiency of the facts found to support the judgment, the appellate court is not permitted to examine the evidence to ascertain whether the findings of fact are justified, such findings being conclusive. *Reed v. Stapp*, 52 *Fed. R.* 641-644, 3 *C. C. A.* 244.

None of the rulings of the trial court, as presented by a bill of exceptions, can be re-examined or reviewed in the appellate courts in a

cause tried by the court without a jury, unless the record shows that the parties waived a jury by written stipulation filed with the clerk, as required by sec. 649, *Rev. Stats., U. S. Comp. Stats.* 1901, p. 525. *City of Detroit v. Schmidt*, 123 *Fed. R.* 1-3, 59 *C. C. A.* 151.

No mere recital of testimony, whether in the opinion of the court or in a bill of exceptions, can be deemed a special finding of facts as provided in secs. 649, 700, *Rev. Stats., U. S. Comp. Stats.* 1901, pp. 525, 570. *Lehnen v. Dickson*, 148 *U. S.* 71-74, 37 *L. ed.* 374, Oct. T., 1892.

Where findings of fact were drawn up and filed after the trial *nunc pro tunc*, it will be presumed that the court had been so requested at the trial. *McGavock v. Woodlief*, 20 *How.* 221-225, 15 *L. ed.* 884, Dec. T., 1857.

A statement of the facts found by the judge filed nearly three months after the rendition of the judgment copied into the record, *held* to be an irregularity; that the court felt bound to disregard such statement and treat it as no part of the record. *Flanders v. Tweed*, 9 *Wall.* 425-429, 19 *L. ed.* 679, Dec. T., 1869.

The special findings required by the Act of Feb. 16, 1875, may be waived by either party; where the record omits the findings of fact and conclusions of law required by the act the court will not return the cause to the trial court to enable such findings to be put into the record unless it clearly appears that their omission is attributable to the fault or neglect of the court and not to the parties. *Winslow v. Wilcox (The S. S. Osborne)*, 104 *U. S.* 183-184, 26 *L. ed.* 693.

A special finding of facts upon a trial submitted to the court without a jury, like a general finding or verdict, is itself a part of the record, and need not be embodied in the bill of exceptions. *Wesson v. Saline County*, 73 *Fed. R.* 917-918, 20 *C. C. A.* 227.

The finding should be complete in itself, unaided by references to the bill of exceptions; though documents set out in the pleadings or in the record may be referred to. *Ib.* 918.

Held, prior to the Act of 1865, secs. 649, 700, *Rev. Stats., U. S. Comp. Stats.* 1901, pp. 525, 570, that where the court below decided both questions of law and of fact no bill of exceptions need be taken.

In the appellate court the question is whether the judgment of the court below was erroneous or not upon the facts before it as they are certified in the record. *United States v. King*, 7 *How.* 833-854, 12 *L. ed.* 943, Jan. T., 1849.

Where a jury is waived as provided in the Act of Mar. 3, 1865, the finding of the court may be either general or special. Where general

the parties are concluded by the determination of the court except in cases where exceptions are taken to the rulings of the court in the progress of the trial, when such rulings may be reviewed in the appellate court, but the findings of the court, if general, cannot be reviewed by bill of exceptions or in any other manner. *Insurance Co. v. Folsom*, 18 *Wall.* 237-248, 21 L. ed. 833, Oct. T., 1873.

Facts found by the trial court where a jury is waived under the Act of 1865 are equivalent to a special verdict, and the appellate court will not examine the evidence on which the finding is founded. The finding of the Circuit Court may be either general or special, and it cannot be required to make a special finding. The bill of exceptions brings up nothing for revision except what it would have done had there been a jury trial. *Ib.* 249.

Power to grant a peremptory nonsuit is not vested in the Circuit Court, but at the close of plaintiff's case defendant may move the court to instruct the jury that the evidence introduced by the plaintiff is not sufficient to warrant the jury in finding a verdict in his favor. Such a motion is not one addressed to the discretion of the court. It presents a question of law. *Ib.* 250.

Under the Act of Mar. 3, 1865, the review in the appellate court, when the finding is special, can extend only to the determination of the sufficiency of the facts found to support the judgment.

Though the finding is general, any rulings of the court on questions of law in the progress of the trial, if excepted to at the time and duly presented by bill of exceptions, may be reviewed. *Dickinson v. Planters Bank*, 16 *Wall.* 250-258, 21 L. ed. 280, Dec. T., 1872.

Where the facts have been specially found by the court below, no bill of exceptions is necessary. The question in the appellate court is whether the facts found are sufficient to support the judgment. *St. Louis v. Ferry Co.*, 11 *Wall.* 423-428, 20 L. ed. 194, Dec. T., 1870.

No exceptions are necessary in case of special findings by the court to raise the question whether the facts found support the judgment. *Seeburger v. Schlesinger*, 152 *U. S.* 581-586, 38 L. ed. 562, Oct. T., 1893.

Where a cause is tried by the court without a jury, as provided by secs. 649, 700, *Rev. Stats., U. S. Comp. Stats.* 1901, pp. 525, 570, no bill of exceptions is required to bring upon the record the findings, whether general or special. To authorize a judgment there must be findings of fact which must appear of record. *Insurance Co. v. Boon*, 95 *U. S.* 117-124, 24 L. ed. 396, Oct. T., 1877.

Where the judgment has been rendered in a cause tried by the court a special finding of fact may be filed at a subsequent term *nunc pro tunc* by special order of the court. *Ib.* 124.

The only office of a bill of exceptions is to bring upon the record rulings that without it would not appear. *Ib.* 125.

If a jury is waived and the court chooses to find generally for one side or the other, the losing side has no redress except for the wrongful admission or rejection of evidence. *Dirst v. Morris*, 14 *Wall.* 484-490, 20 L. ed. 723, Dec. T., 1871.

Prior to the Act of Mar. 3, 1865, where a jury was waived and the cause tried by the court, no questions of fact or of law, decided by the court below, could be reviewed upon writ of error. *Campbell v. Boyreau*, 21 *How.* 223-226, 16 L. ed. 96, Dec. T., 1858.

Upon such waiver of a jury the judge in deciding questions of fact upon the evidence does not exercise judiciary authority, but acts rather in the character of an arbitrator, and no exception could be taken to any opinion of the court upon the admission or rejection of testimony unless the jury was actually empaneled and the exception reserved while they were at the bar. *Ib.* 226.

Where a cause was tried in the District Court without a jury, on an agreed statement of facts, the Circuit Court was held to have no power to review the opinion of the District Court upon the admission or rejection of testimony or upon any other question of law, but could only affirm the judgment. *Rogers v. United States*, 141 *U. S.* 548-554, 35 L. ed. 856, Oct. T., 1891.

Even before the Act of 1865, reproduced in secs. 649, 700, *Rev. Stats.*, *U. S. Comp. Stats.* 1901, pp. 525, 570, a judgment on agreed facts spread at large upon the record, could be reviewed on writ of error; such statement being equivalent to a special verdict and presenting questions of law for the consideration of the court. The Act of 1865 is not intended to interfere with this practice. *Supervisors v. Kennicott*, 103 *U. S.* 554-556, 26 L. ed. 487, Oct. T., 1880.

A stipulation signed by counsel after judgment which does not contain any agreement as to the existence of facts, but is a mere statement of what the proof showed in the trial, will not be considered by the appellate court, which can take no notice of any facts not found by the court below. *Chicago T. & S. Works Co. v. Spaulding*, 116 *U. S.* 541-545, 29 L. ed. 722, Oct. T., 1885.

The fact that objections are made to the admission or exclusion of evidence and are overruled, is not sufficient in the absence of exceptions to bring them before the court. *Newport News & M. V. Co. v. Pace*, 158 *U. S.* 36-37, 39 L. ed. 887.

It is the duty of counsel excepting to propositions submitted to a jury to except to them distinctly and severally, and where they are

excepted to en masse the exception will be overruled, if any of the propositions be correct. *Ib.* 37.

A general exception taken to the refusal of a series of instructions will not be considered if any one of them be unsound. *Ib.* 38.

To enable an appellate court to review the action of the trial court upon the admission or exclusion of evidence, the evidence to which the exception is directed must be incorporated in the bill of exceptions. *National Masonic Acc. Assn. v. Sparks*, 83 *Fed. R.* 225-228, 28 *C. C. A.* 399.

In the absence from the bill of exceptions of the evidence, the presumption is that the rulings of the trial court were right. *Sipes v. Seymour*, 76 *Fed. R.* 116-118, 22 *C. C. A.* 90.

The burden of proof to show that there was no evidence to warrant a charge is on him who asserts the error, and he must present all the evidence to the appellate court, or must present a bill of exceptions certifying that no evidence of the character in question was presented to it, if he would maintain his claim. *United States v. Patrick*, 73 *Fed. R.* 800-806, 20 *C. C. A.* 11.

The action of the lower court in directing a verdict in favor of either party cannot be reviewed where the bill of exceptions fails to show that it contains all the evidence. *Rollins & Sons v. Board of Commissioners*, 80 *Fed. R.* 692-695, 26 *C. C. A.* 91.

When a peremptory instruction is given to find in favor of either party, the only question with respect to the charge to be reviewed, open for consideration in the appellate court, is whether the direction, when considered in the light of the pleadings and all the evidence, is right. *Ib.* 695.

The giving of instructions over objection and the refusal of the court to give instructions asked for, cannot be considered, unless the bill of exceptions contains the evidence on which the questions of law raised by the instructions refused or asked are based. It is not enough that the testimony is found in another part of the record. *Southwestern Virginia Imp. Co. v. Frari*, 58 *Fed. R.* 171-173, 7 *C. C. A.* 149.

Error to be available must be affirmatively shown by the record, and, in the absence of such showing, every intendment will be indulged in to support the judgment. *Masonic Benefit Assn. v. Lyman*, 60 *Fed. R.* 498-500, 9 *C. C. A.* 104.

Where documentary evidence is excluded by ruling of the court, if the documents excluded are not set out in the bill of exceptions, their exclusion is not available error. *Ib.* 500.

Depositions, exhibits, or certificates not contained in the bill of exceptions cannot be considered by the appellate court. *Reed v. Gardner*, 17 *Wall.* 409-411, 21 L. ed. 665.

Evidence may be included in a bill of exceptions by appropriate reference to other parts of the record. *Jones v. Buckell*, 104 *U. S.* 554-556, 26 L. ed. 841.

Whether a verdict is general or special a bill of exceptions is not necessary to make it a part of the record. *Daube v. Phila. & Reading Coal & Iron Co.*, 77 *Fed. R.* 713-714, 23 *C. C. A.* 420.

On appeal plaintiff in error cannot urge objections to instructions different from those to which he confined his exceptions in the trial court. *Northern Pacific Ry. Co. v. Krohne*, 86 *Fed. R.* 230-235, 29 *C. C. A.* 674.

Exceptions to the charges of the court should call the court's attention to the particular point or portions of the charge to which the exception is taken, and a general exception to the charge and opinion of the court raises no question for review. *Conn. Life Ins. Co. v. Union Trust Co.*, 112 *U. S.* 250-261, 28 L. ed. 708.

If the exceptant fails to direct specially the attention of the court to any proposition of law in a charge general in its character, when it is refused as a whole and the party excepts generally to the ruling of the court in refusing the instruction, the exception is not well taken. *Anderson v. Avis*, 62 *Fed. R.* 227-229, 10 *C. C. A.* 347.

An exception to a general charge in terms "said exception being to the whole of said instructions and to each and every part thereof," cannot be sustained if any of the propositions of law contained in the charge are sound. *Price v. Parkhurst*, 53 *Fed. R.* 312-313, 3 *C. C. A.* 551.

It matters not that the judge may be willing to consent to such a bill. He cannot waive the rule so far as it requires specific exceptions. The rule is mandatory. *Ib.* 313.

It is the duty of the court to allow the parties reasonable time and facility for specifying exceptions before the case is finally given to the jury. *Ib.* 313.

Where a series of propositions were submitted to the court as one request to be charged, and according to the bill of exceptions, "each and all of the requested instructions the court refused to give, to which refusal the defendant then and there excepted," *Held*, the objections could not be considered on appeal. *Cleveland, C., C. & St. L. Ry. Co. v. Zider*, 61 *Fed. R.* 908-909, 10 *C. C. A.* 151.

In a case tried by the court without a jury, where the record contains the evidence, the findings, and requests and refusals to find, and scattered throughout were entries, "the plaintiff excepts," "defendants except," "the plaintiff takes exception to the ruling of the court;" and to the general finding and special findings of fact and conclusions of law, to each and every one of which there is an entry in the words, "To which said opinion and finding of the court said plaintiff by his attorney does then and there except," although certified as a bill of exceptions, it is not sufficient to permit a review of the questions sought to be raised. *Marion Phosphate Co. v. Cummer*, 60 *Fed. R.* 873-876, 9 *C. C. A.* 279.

Each exception should be drawn up in form, stating the ruling of the court, the exception thereto, and the grounds of the ruling or of the exception. *Ib.* 877.

An exception to the charge of the court in terms, "the defendants then and there duly excepted to said charge in its entirety and to the following portions thereof," followed by a series of propositions embracing substantially all the charge, is not available if any of the portions excepted to is good. *Vider v. O'Brien*, 62 *Fed. R.* 326-327, 10 *C. C. A.* 385.

Held, by the Supreme Court before the act establishing the Court of Appeals, that under the Act of Feb. 16, 1875 (18 *Stat. L.* 315), the findings of fact of the Circuit Court in an admiralty case were conclusive, and that the Supreme Court could not be required to weigh evidence; that if errors existed in the findings of fact they could only be corrected by the court below. *The Benefactor*, 102 *U. S.* 214-218, 26 *L. ed.* 159, Oct. T., 1880.

The Supreme Court held that questions depending on the weight of the evidence under the Act of Feb. 16, 1875, were conclusively settled in the court below. *The Frances Wright*, 105 *U. S.* 381-387, 26 *L. ed.* 1102, Oct. T., 1881.

Under the Act of Feb. 16, 1875 (18 *Stat. L.* 315), providing in admiralty causes that the Circuit Court shall find and state the facts and conclusions of law separately, and that review upon appeal shall be limited to a determination of the questions of law, and to the trial court's rulings excepted to at the time, the findings of fact by the Circuit Court are conclusive. Only questions of law to be presented by a bill of exceptions can be reviewed. *The Abbotsford v. Johnson*, 98 *U. S.* 440-441, 25 *L. ed.* 169.

An appeal will not be dismissed because there is no bill of exceptions in the record. Under the Act of Feb. 16, 1875, the findings must be stated by the court and become a part of the record, and errors of law arising on such findings need not be presented by exceptions. *Nicker-*

son v. Merchants S. S. Co. (Schooner S. S. Tryon), 105 U. S. 267-270, 26 L. ed. 1026.

The limitation on appeals in admiralty to a review of questions of law is within the constitutional power of Congress. *Duncan v. The Frances Wright*, 105 U. S. 381-384, 26 L. ed. 1101.

RULE XI—Assignment of Errors¹

The plaintiff in error, or appellant, shall file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of errors which shall set out separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of errors shall have been filed. When the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the assignment of errors shall set out the part referred to *totidem verbis*, whether it be in instructions given or in instructions refused. Such assignment of errors shall form part of the transcript of the record and be printed with it. When this (rule is not complied with, as the rule reads in the Fourth Circuit) is not done counsel will not be heard, except at the request of the court, and errors not assigned according to this rule will be disregarded, but the court at its option may notice a plain error not assigned.

Each error to be set out.

Substance of the evidence, when set out.

When parts of the charge set out with grounds of objection.

Errors not assigned disregarded.

In the *Third Circuit* the rule reads:

(1) The plaintiff in error or appellant shall file with the clerk of the court below, with his petition for the writ of error or appeal, his assignments of error, as required by sec. 997 of the Revised Statutes, which shall set out separately and particularly each error asserted and intended to be urged. [See Rule 14, sec. 6.] When the error alleged is to the admission or the rejection of evidence, the assignment shall quote the full substance of the evidence admitted or rejected; when

¹ See Rule 24, par. 4, *post*.

the error alleged is to the charge of the court, the assignment shall set out the part referred to *totidem verbis*, whether it be in instructions given or in instructions refused; when the error alleged is based on the trial court's refusal to enter a judgment *non obstante veredicto* for the plaintiff in error on the whole record, the assignment shall state the reasons presented to the trial court for the entry of such judgment; when the error alleged is to a ruling upon the report of a master or referee, the assignment shall state the exception to the report and the action of the court upon it. Such assignments of error shall form part of the transcript of the record and be printed with it. When error is not so assigned, counsel will not be heard, except at the request of the court, and errors not assigned according to this rule will be disregarded. The court, at its option, however, may notice a plain error not assigned.

In the *Seventh Circuit*, the rule contains the following clause:

"When the evidence rejected is oral testimony a written statement of the substance of what the witness was expected to testify shall be filed and brought to the attention of the court before the retirement of the jury," and after the word "refused" are added the words, "and shall state distinctly the grounds of objection to an instruction given."

Decisions

An order granting or refusing a new trial, which the court has the jurisdiction or power to make is discretionary and cannot be reviewed by a writ of error or appeal in the Federal courts. The question whether or not the court has the jurisdiction or power to make an order granting or refusing a new trial and avoiding a former judgment is reviewable. *City of Manning v. German Ins. Co.*, 107 *Fed. R.* 52-54, 46 *C. C. A.* 144.

Held, in an action at law, that in the Federal courts a ruling by the trial court, on a plea in abatement, is not reviewable by writ of error. *U. S. Rev. Stats.*, sec. 1011; *U. S. Comp. Stats.* 1901, p. 715; *Barnsdall v. Waltemeyer*, 142 *Fed. R.* 415-418, 73 *C. C. A.* 515.

An appeal is a matter of right. A writ of error is allowed upon consideration and determination of whether the alleged errors form reasonable grounds for the review of the judgment below. The Acts of Congress, secs. 997, 1012, *Rev. Stats.* (*U. S. Comp. Stats.* 1901, pp. 712,

716), do not require the filing of an assignment of errors before the allowance of a writ of error or of an appeal, but Rule 11 provides that "no writ of error or appeal shall be allowed until such assignment of errors shall have been filed." *Held*, that the filing of such assignment of errors before or at the time of the allowance of an appeal as required by Rule 11, is in time, if filed before or at the time of the giving and acceptance of the bond required to perfect the appeal, where the allowance of an appeal is conditional upon the giving of a bond. *Simpson v. First National Bank*, 129 *Fed. R.* 257-259, 63 *C. C. A.* 371.

Rule 11 is sufficiently complied with when the order of allowance for appeal, together with the petition and the assignment of errors, are filed in the court below on the same date, and that date is the time from which it may be said that the order of allowance takes effect. *Copper River Mining Co. v. McClellan*, 138 *Fed. R.* 333-337, 70 *C. C. A.* 623.

The substantial result secured by Rule 11 is that the assignments of errors shall be on file at the time when the writ of error is taken out and the citation issued. *Alaska United Gold M. Co. v. Muset*, 114 *Fed. R.* 66-68, 52 *C. C. A.* 14.

The court will not consider errors where no assignment of errors was filed in the court below until after the time allowed for perfecting the appeal had expired. *United States v. Goodrich*, 54 *Fed. R.* 21, 4 *C. C. A.* 160.

An assignment of error filed in the trial court after the filing of the petition for writ of error, though the trial judge allowed additional time for filing such assignment at the time the petition was filed and the appeal allowed, and the assignment was filed within the time allowed, is irregular and not in compliance with Rule 11, which inhibits the allowance of the writ of error until the assignment of error is filed. *Mutual Life Ins. Co. v. Conoley*, 63 *Fed. R.* 180-181, 11 *C. C. A.* 116.

In a bankruptcy proceeding an appeal upon condition that the party give bond does not become effective until the bond on appeal has been given and accepted, and an assignment of errors filed before or at the time of the acceptance of the bond is within the time prescribed by Rule 11. *Lockman v. Lang*, 132 *Fed. R.* 1-2, 65 *C. C. A.* 621.

An appeal may be perfected without a formal order of allowance; it is in legal effect allowed when the circuit judge takes the security offered and signs the citation. *Brandies v. Cochrane*, 105 *U. S.* 262, 26 *L. ed.* 989.

It is enough that a writ of error be issued by the clerk and served by a copy lodged with the clerk of the court to which it is directed,

but security must be given and citation signed by a judge of the Circuit Court or a judge or justice of the appellate court. *Ex parte Virginia Commissioners*, 112 *U. S.* 177-178, 28 L. ed. 691.

The absence of a formal petition for a writ of error and of an order allowing the writ of error is a defect of form merely, and if the writ has issued upon a substantial compliance with Rule 11, such defects are cured by secs. 954 and 1005, *Rev. Stats.* (*U. S. Comp. Stats.* 1901, pp. 696, 714), and sec. 11 of the Act of Mar. 3, 1891 (26 *Stat. L.* 826-829). *Alaska U. G. Min. Co. v. Keating*, 116 *Fed. R.* 561-564, 53 *C. C. A.* 655.

Where the errors are incorporated into the petition for appeal and the petition is then filed with the clerk, the assignment of errors must be deemed to be filed with the petition in compliance with Rule 11. *Central Trust Co. v. Continental Trust Co.*, 86 *Fed. R.* 517-523, 30 *C. C. A.* 235.

Rule 11 is based upon the provision of *Rev. Stats.*, sec. 1012 (*U. S. Comp. Stats.* 1901, p. 716), that appeals shall be subject to the same rules as writs of error, and sec. 997, *Rev. Stats.* (*U. S. Comp. Stats.* 1901, p. 712), that an authenticated transcript of the record and assignment of errors and citation shall be annexed to and returned with any writ of error. *Dufour v. Lang*, 54 *Fed. R.* 913-917, 4 *C. C. A.* 663.

The omission to file an assignment of errors is not jurisdictional and the court may in the proper case entertain an appeal and notice a plain error not assigned or specified. *Ib.* 917.

The court has no jurisdiction to consider a case where the writ of error was sued out and the assignment of errors filed in the court below more than six months after the judgment was rendered. *Union Pacific Ry. Co. v. Colorado Eastern Ry. Co.*, 54 *Fed. R.* 22, 4 *C. C. A.* 161.

Assignments of error are required in appeals as well as on writs of error. On review by appeal such assignments of errors must be directed to the rulings of the court. *Randolph v. Allen*, 73 *Fed. R.* 23-29, 19 *C. C. A.* 353.

Elaborate arguments to support the contention that the court erred in sustaining the findings of the master, constitute a disregard of the rule. *Ib.* 29.

The appellant's failure to file with the clerk of the trial court an assignment of errors before the appeal is allowed as required by Rule 11 is not ground for dismissal. The rule is directory and its requirements are not jurisdictional. *Hultberg v. Anderson*, 203 *Fed. R.* 853-855.

NOTE. In the 8th circuit the court has dismissed appeals and writs of error for noncompliance with this rule.

An omission to set out in the title of an assignment of errors the names of all the parties on the record whose interests are affected by the appeal does not affect the jurisdiction of the court over parties who are brought in by citation or equivalent notice, or by their voluntary appearance. *Andrews v. National F. & P. Works*, 76 *Fed. R.* 166-171, 22 *C. C. A.* 90.

Where no sufficient assignment of errors have been filed, under Rule 11 the court may examine the record to determine whether it presents any plain error of a controlling character of which the court would be warranted in taking notice.

In such a case the court may exercise its option to notice a plain error not assigned, or if no error appears of which the court deems itself warranted to take notice, affirm the decree for want of sufficient assignment of errors. *City of Memphis v. St. Louis & S. F. R. Co.*, 183 *Fed. R.* 529, 106 *C. C. A.* 75.

A plain error not assigned may be, and ought to be, considered where the failure would result in great injustice. *Central Improvement Co. v. Cambria Steel Co.*, 201 *Fed. R.* 811-818, 120 *C. C. A.* 121.

An exception taken immediately upon this ruling being made is indispensable to a review of a ruling in the trial court. *Potter v. United States*, 122 *Fed. R.* 49-55, 58 *C. C. A.* 231.

Where a charge of the trial court was indefinite and misleading and exception taken sufficiently pointed out to such court the objections thereto, and the verdict involved far-reaching consequences, the appellate court will exercise the discretion granted by Rule 11 and notice the plain errors in the charge even if the error was not duly assigned. *Western No. Car. Land Co. v. Scaife*, 80 *Fed. R.* 352-357, 25 *C. C. A.* 461.

Where the specifications in the assignment of errors are aimed at the opinion of the court and not to the decree, they will not be considered. *McFarlane v. Golling*, 76 *Fed. R.* 23-24, 22 *C. C. A.* 23.

An assignment of errors cannot be good if it is necessary to look beyond its terms to the brief for a specific statement of the questions to be presented. *Grape Creek Coal Co. v. Farmers' L. & T. Co.*, 63 *Fed. R.* 891-894, 12 *C. C. A.* 150.

Cross-appeals must be prosecuted like other appeals upon petition and order of allowance filed in the court below, and cross-assignments of error. *Building & Loan Assn. v. Logan*, 66 *Fed. R.* 827-828, 14 *C. C. A.* 133.

A cross-assignment of error by appellee cannot be considered where the record shows no cross-appeal. *Ib.* 828.

A court will disregard assignments of error relating to the giving or refusing of instructions as prayed for, unless they set out the instructions in full. *Pritchard v. Budd*, 76 *Fed. R.* 710-715, 22 *C. C. A.* 504.

There must be a separate assignment of error in respect to each part of a charge which is alleged to be erroneous, or, if it is sought by a single specification of error to question more than one proposition, it must be distinctly alleged that there was error in giving or refusing severally each of the propositions which it was intended to challenge. *Vider v. O'Brien*, 62 *Fed. R.* 326-327, 10 *C. C. A.* 385.

Where the party excepted to the charge in its entirety and "to the following portions thereof," followed by a series of ten or more propositions embracing substantially all the charge, such an exception, *Held*, not available if any one of the portions excepted to is good. *Ib.* 327.

Where it is apparent that in giving or refusing instructions the court has committed an essential error to the probable injury of the appellant, if exceptions have been properly taken the court may notice the error although such error is not specifically assigned. *Atchison, T. & S. F. R. Co. v. Mulligan*, 67 *Fed. R.* 569-572, 14 *C. C. A.* 547.

When the error is technical and probably did not affect the verdict, the rule will be applied with strictness. *Ib.* 572.

Where the exceptions in the trial court fail to apprise the trial judge of the point raised on appeal, and set out in the assignment of errors, such assignment will not be considered. *Springer Lithographing Co. v. Falk*, 59 *Fed. R.* 707-711, 8 *C. C. A.* 224.

The court will not consider or allow a question first made in the brief of counsel, not mentioned in the assignments of error or made before the master or the Circuit Court at the hearing. *Third National Bank v. National Bank*, 86 *Fed. R.* 952-958, 30 *C. C. A.* 436.

The object of Rules 11 and 24 is to so present the matter raised by the assignments of error that the appellate court may understand what the question is it is called on to decide without going beyond the assignment itself; and also that the party excepting may be confined to the objection taken at the time, which must then have been stated specifically. *Van Gunden v. Virginia Coal & Iron Co.*, 52 *Fed. R.* 838-840, 3 *C. C. A.* 294.

An assignment of error cannot be accepted as proof of the facts alleged therein. And where there is nothing else in the record to show

that the court did or did not rule as asserted, it cannot be considered. *Woodbury v. City of Shawneetown*, 74 *Fed. R.* 205-206, 20 *C. C. A.* 400.

The action of the trial court in giving effect or failing to give effect to a particular statute will not be reviewed on writ of error where the question was not presented to the trial court and some specific assignment made definitely pointing out the action of the court against which the party complained. *City of Findlay v. Pertz*, 74 *Fed. R.* 681-685, 20 *C. C. A.* 662.

In a specification of error it is improper to set forth the reasons why a ruling complained of is claimed to be erroneous, or to state the fact that the party duly objected and excepted to rulings complained of, or in specifications of error upon the charge of the court, to state that exceptions were taken, and of the grounds of objection. *Atchison, T. & S. F. Ry. Co. v. Meyers*, 76 *Fed. R.* 443-445, 22 *C. C. A.* 268.

A peremptory direction of a verdict requires no such accuracy of expression as a request for instructions upon a proposition of law, and only an informal motion is necessary; whether it be sustained or overruled, an assignment of error on the ruling is not governed by the provision of Rule 11 concerning instructions given or refused. *Ib.* 447.

Where each party requests the court to direct the jury to find a verdict in his favor he thereby concedes that the case presents no question for the jury, waives his right to their decision of every issue therein, and requests the court to find the facts and declare the law; and when pursuant to such requests the court accepts these waivers, and by its peremptory instructions determines the questions of fact and of law in favor of one of the parties, both parties are estopped from assailing or reviewing its findings upon the disputed issues of facts, and are limited in the appellate court to a review of the two questions: (1) Was there any substantial evidence to sustain the court's finding of facts, and (2) was there any error in his declaration or application of the law? *United States v. Bishop*, 125 *Fed. R.* 181-183, 60 *C. C. A.* 123.

Assignments of error which amount to nothing more than that the court erred in deciding the case in favor of the opposite party will be stricken from the transcript as too general. *Florida C. & P. Ry. Co. v. Cutting*, 68 *Fed. R.* 586-587, 15 *C. C. A.* 597.

Where such general assignment of errors has been filed in the court below the appellate court will refuse leave to file further additional assignments of error setting forth the grounds on which the former assignment was based. *Ib.* 587.

Assignments that the court erred in rendering judgment against the defendant and in not rendering the judgment in his favor, do not

comply with the rule, in that they fail to point out any particular error asserted and intended to be urged. Since it can only be conjectured whether they mean that a wrong result was reached because the facts were erroneously decided, or because the court erred in applying the law to the facts. *United States v. Ferguson*, 78 *Fed. R.* 103-105, 24 *C. C. A.* 1.

The court may examine the brief of the plaintiff in error to see if it discloses any plain error not assigned. *Ib.* 106.

Findings of fact made by the court cannot be reviewed where the evidence is not in the record. *Ib.* 105.

Where the appellant did not ask in the court below a peremptory instruction for a verdict in his behalf, it cannot be a ground of reversal that the issues of fact were submitted to the jury. *Hartford Life Ins. Co. v. Unsell*, 144 *U. S.* 439-451, 36 *L. ed.* 496.

An assignment of errors that the verdict is not supported by the evidence will not be considered if the appellant did not, in the court below, at the close of the whole evidence ask for a peremptory instruction of a verdict in his behalf. *Western Coal & M. Co. v. Ingham*, 70 *Fed. R.* 219-222, 17 *C. C. A.* 71.

Where the plaintiff in error excepted to the directions of the trial judge that a verdict be rendered for the opposite party and did not ask to have any specific questions of facts submitted to the jury, an assignment of errors to the rulings of the court will not be sustained. *Gugenheim v. Kirchhofer*, 66 *Fed. R.* 755-757, 14 *C. C. A.* 72.

An assignment of errors that the court erred in admitting testimony over objections, in refusing to receive evidence offered, that the verdict is contrary to law and not supported by the evidence, that the court erred in instructing the jury to find for the opposite party, and in rendering judgment for the opposite party, fails to bring any specific error to the attention of the appellate court and does not comply with Rule 11. *Oswego Township v. Travellers Ins. Co.*, 70 *Fed. R.* 225-226, 17 *C. C. A.* 77.

If the party cast in the trial court so multiplies his exceptions as to cover all the action of the court and makes each exception taken the basis of a special assignment of errors, the fact is equivalent to a general assignment. But where such numerous assignments are framed with an effort to conform with Rule 11 they will not be stricken out on motion. *Florida Central & P. R. Co. v. Bucki*, 68 *Fed. R.* 864-867, 16 *C. C. A.* 42.

An assignment of errors which reads "there is error in said decree in this: that the court upon the whole evidence should have rendered

a decree in favor of the complainant," is too general, and it is not proper to attempt to aid the same by making the assignments more particular in the brief. *Doe v. Waterloo Mining Co.*, 70 *Fed. R.* 455-461, 17 *C. C. A.* 190.

An assignment of error that the trial court erred in overruling "each and every of the several exceptions," of the appellant to the finding and report of the master, and in approving and confirming the master's findings and report, is fatally defective. *Rhode Island L. Works v. Continental Trust Co.*, 108 *Fed. R.* 5-9, 47 *C. C. A.* 147.

An assignment of errors containing but one specification and embracing two distinct propositions is contrary to Rule 11. In this case the form of the assignment was that the court erred in holding that respondents had not infringed upon a patent and had erred in declining to grant an injunction, in a single assignment of errors. *Clarke v. Deere & Manser Co.*, 80 *Fed. R.* 534-536, 25 *C. C. A.* 619.

Where the error assigned is that the court decreed certain letters patent valid, and the brief of appellee's counsel considers and discusses this question without any suggestion that the assignment of error is not sufficiently specific, it is too late to complain of the failure to more specifically assign the error, and appellee should be deemed to have waived a more definite assignment. *Michigan Cent. R. Co. v. Consolidated Car. H. Co.*, 69 *Fed. R.* 1-2, 16 *C. C. A.* 106.

In an admiralty suit, the appeal being a new trial, the court may, upon a sufficient showing, permit additional assignments of error and remand the cause to the District Court with directions to have the assignments of error added in that court and the record as amended thereafter returned. *Corey v. Penco*, 76 *Fed. R.* 997-1000, 22 *C. C. A.* 675.

In the Federal courts the question of excessive damages awarded by the verdict can be reviewed only on a motion for a new trial in the trial court, and not on writ of error. *Railroad Co. v. Winter's Admr.*, 143 *U. S.* 60-75, 36 *L. ed.* 71.

The court will not consider alleged errors in the admission and exclusion of evidence, unless the testimony that is claimed to have been erroneously admitted or excluded is set out substantially in the assignment of errors and in the brief as required by Rule 11 and Rule 24. *Haldane v. United States*, 69 *Fed. R.* 819-821, 16 *C. C. A.* 447.

Where assignments of error for permitting a witness to answer questions do not show that the questions were answered, and the substance of the answers, and for error in overruling a motion to strike

out the answer of the witness, do not show what the answers were, they are not in compliance with the rule, and will not be noticed by the appellate court. *American Nat. Bank v. National Wall P. Co.*, 77 *Fed. R.* 85-91, 23 *C. C. A.* 33.

Assignments of error, in permitting a witness to testify over objection, will not be considered where the evidence admitted, or its substance, is not set forth. *Newman v. Virginia T. & C. S. & I. Co.*, 80 *Fed. R.* 228-231, 25 *C. C. A.* 382.

The full substance of the evidence admitted or rejected should be stated in the specification when the error alleged is to the admission or rejection of evidence, either oral or documentary. *United States v. Indian Grave Drainage Dist.*, 85 *Fed. R.* 928-931, 29 *C. C. A.* 578.

When a witness is not permitted to answer a question the assignment should quote the full substance of the evidence which it was proposed to elicit, and the bill of exceptions should be made to show just what facts it was proposed to prove in answer to the question. This may be done by a statement in writing made to the court before the conclusion of the trial. *Ib.* 931.

Each separate exception intended to be urged should be made the subject of a distinct specification in the assignment of errors, though the court in its discretion may waive a strict compliance with this rule. *Ib.* 932.

A proper specification of error for the rejection of testimony is, "The court erred in overruling the following question, propounded to the witness A. B. (here a statement of the question), to which the witness was expected to answer as follows (here a quotation of the full substance of the expected answer)." *Ib.* 932.

Where the assignment of errors does not set out the full substance of the evidence admitted or rejected and does not particularize the error which is complained of, but has sound merit in it, so that the court is satisfied from the whole record that a probable injustice has been done, it may notice a plain and meritorious error though not assigned or defectively assigned. *National Acc. Soc. v. Spiro*, 78 *Fed. R.* 774-779, 24 *C. C. A.* 334.

An assignment that the court erred in admitting in evidence certain documents "as set forth in bill of exceptions," is bad, because it does not contain a statement of the full substance of the documents referred to. *Atlas Distilling Co. v. Rhinstrom*, 86 *Fed. R.* 244, 30 *C. C. A.* 10.

Rule 11, which requires the full substance of the evidence admitted or rejected to be quoted in the assignment of errors, *Held*, not to be in conflict with Clause 3 of Rule 10 of the Rules of the Court of Appeals of

the Seventh Circuit (91 *Fed. R.* v), directing that no document be copied more than once in a bill of exceptions or a transcript, but instead there shall be inserted a reference to the one copy set out: that if a full copy is set out in the assignment of errors it is the duty of the clerk below in preparing the transcript, and of the clerk of the appellate court in printing the record, to cause it to so appear and to make the proper references thereto from other parts of the record. *Adams v. Shirk*, 105 *Fed. R.* 659-661, 44 *C. C. A.* 653.

An assignment of error that the court erred in admitting in evidence Exhibits A and B is not in compliance with that provision of Rule 11 which requires that the full substance of the evidence admitted shall be quoted. *Davidson S. S. Co. v. United States*, 142 *Fed. R.* 315-318, 73 *C. C. A.* 425.

Under Rule 11 an assignment of error that "the court erred in overruling defendant's offer of the letter of H. to G.," is fatally defective. *Crosby v. Emerson*, 142 *Fed. R.* 713-719, 74 *C. C. A.* 45.

A brief statement of the substance of the exhibits in the record referred to by numbers is necessary to comply with Rule 11. A mere reference to exhibits by their numbers gives the court no indication of the character of the evidence, and is a disregard of the letter and spirit of the rule. *Northwestern, etc., Co. v. Great Lakes E. Wks.*, 181 *Fed. R.* 38, 104 *C. C. A.* 59.

Where the language of a charge deemed erroneous expresses a single proposition of law with unambiguous directness, it is sufficient on exception to quote the same; but if the quotation embraces different propositions or is supposed to carry implications beyond what is expressed, the exception should state the particular meaning or implication, the exact proposition of law objected to, and the language be brought up in the bill of exceptions and set out in the words used as required by Rule 11, in the specification of error. *Stewart v. Morris*, 96 *Fed. R.* 703-705, 37 *C. C. A.* 562.

An assignment of errors "that the court erred in refusing to instruct the jury as requested by said defendant, a copy of which instructions so requested and refused, with the ruling of the court and exceptions of defendant thereto is hereto annexed and marked Exhibit A," followed by seven different instructions separately stated and in numerical order, cannot be considered. *Southerland v. Brace*, 71 *Fed. R.* 469-472, 18 *C. C. A.* 199.

The substance of the evidence, the admission or rejection of which is alleged to be error, must be quoted, and an assignment of errors

in terms that the court erred in excluding legal and proper evidence offered, and in admitting illegal and improper evidence, is in disregard of Rule 11. *National Bank of Commerce v. First National Bank*, 61 *Fed. R.* 809–811, 10 *C. C. A.* 87.

Where a jury is waived and the case tried by the court, which makes a general finding, there are only two methods by which questions of law can be so presented to the trial court that they may be reviewed on appeal, viz: by seasonable objections and exceptions to the rulings of the court on the admission or rejection of evidence, and by requesting the court, before the trial is ended, to make declarations of law and by excepting to its refusal to do so, and also to its declarations of law, if any, deemed erroneous. *Ib.* 810.

When the trial court makes a special finding of the facts, the appellate court can only consider whether the facts found are sufficient to sustain the judgment rendered. The sufficiency of the evidence to sustain the finding is never presented unless before the trial is ended a request is made that the court shall hold the evidence insufficient. *Ib.* 810.

Under sec. 649, *Rev. Stats., U. S. Comp. Stats.* 1901, p. 525, providing that the findings of the court on the facts upon a trial before the court without a jury may be either general or special and shall have the same effect as the verdict of a jury, and sec. 700, *Rev. Stats., U. S. Comp. Stats.* 1901, p. 570, providing for review by a bill of exceptions, the ruling of the court upon a motion to dismiss the action at the close of the evidence in a cause tried before the court without a jury is reviewable without a special finding of facts. *Paul v. Delaware, L. & W. R. Co.*, 130 *Fed. R.* 951–953.

Besides the motion to dismiss at the close of the evidence, questions of law for review may be raised by submitting to the court declarations of law and asking findings thereon. *Ib.* 953.

The following rules applicable to the trial by the court without a jury announced: (1) If the verdict be a general verdict only such rulings of the court in the progress of the trial can be reviewed as are presented by bill of exceptions or as may arise on the pleadings. (2) Where the cause is tried before the court without a jury a bill of exceptions cannot be used to bring up the whole testimony for review. (3) Where a cause is tried by the court without a jury if a review of the law involved in the case is desired the parties must get the court to file a special verdict which raises the legal proposition or they must present to the court their propositions or declarations of law and require the court to rule on them. (4) Objections to the admission or exclusion of evidence or to such ruling on the propositions of law as the parties may ask must appear by bill of exceptions. (5) Under sec. 1011, *Rev. Stats. (U. S. Comp. Stats.* 1901, p. 715), whether the finding be general or special it shall have the same effect as the verdict of a jury. The sufficiency of the evidence to support the findings cannot be considered

by the appellate court. Such finding is conclusive as to the fact found. (6) A general verdict which may include mixed questions of law and fact is conclusive as to both, except so far as they may be saved by some exception which the party has taken to the ruling of the court upon a question of law. (7) In the case of a special verdict the question is presented whether the facts as found require a judgment for plaintiff or defendant and the ruling of the court on it can be reviewed upon appeal. (8) Errors alleged in the findings of the court are not subject to review on appeal, but the appellate court may consider whether there is any evidence upon which such findings could be made. *Ib.* 951-956.

Each of the above eight rules is supported by numerous citations making the case specially valuable as a guide to practitioners.

Where three defendants were jointly indicted, but separately sentenced, an assignment of error that the court erred in the sentence which it passed upon the defendants is too general and indefinite. *MacDonald v. United States*, 63 *Fed. R.* 426-432, 12 *C. C. A.* 339.

RULE XII—*Objections to Evidence in the Record*

In all cases of equity or admiralty jurisdiction heard in this court, no objection shall be allowed to be taken to the admissibility of any deposition, deed, grant, exhibit, or translation found in the record as evidence, unless objection was taken thereto in the court below and entered of record; but the same shall otherwise be deemed to have been admitted by consent.

Objections must be taken in court below.

RULE XIII—*Supersedeas and Cost Bond*

(1) Supersedeas bonds in the (Circuit and) District Courts must be taken, with good and sufficient security, that the plaintiff in error or appellant shall prosecute his writ or appeal to effect, and answer all damages and costs, if he fail to make his plea good. Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just damages for delay, and costs and interest on the appeal; but in all suits where

To prosecute to effect and answer all damages.

On money judgments, to be for full sum and damages.

the property in controversy necessarily follows the suit,

Real actions.—Replevin foreclosures.

as in real actions and replevin, and in suits on mortgages, or where the property

is in the custody of the marshal under admiralty process, or where the proceeds thereof, or a bond for the value thereof, is in the custody of the court, indemnity in all such cases will,

Sufficient to secure damages for use and detention.

be required only in an amount sufficient to secure the sum recovered for the use

and detention of the property, and the costs of the suit and just damages for delay, and costs and interest on the appeal.

(2) On an appeal from an interlocutory order or decree, the appellant shall, at the time of the allowance thereof, file a bond to the adverse party in such sum as the judge who allowed the appeal shall direct, to answer all costs if he shall fail to sustain his appeal.

In the *Third, Fifth, Seventh, and Ninth Circuits* the rule is as in the First Circuit, except that the second clause reads:

(2) On all appeals from any interlocutory order or decree **Injunction bond.** granting or continuing an injunction in a Circuit or District Court, the appellant shall, at the time of the allowance of said appeal, file with the clerk of such Circuit or District Court a bond to the opposite party in such sum as such court shall direct, to answer all costs if he shall fail to sustain his appeal.

In the *Second Circuit* clause 2 reads:

“On all appeals from any interlocutory order or decree taken under the provisions of sec. 129 of the act to codify, revise and amend the laws relating to the judiciary, the appellant shall at the time of the allowance of said appeal file with the clerk of the District Court a bond to the opposite party in such sum as such court shall direct to answer all costs if he shall fail to sustain his appeal.

In the *Fourth Circuit*, Clause 2 reads:

On all appeals under sec. 129 of the Judicial Code the appellant shall at the time of the allowance of said appeal, if required by the judge of the court below, file with the clerk of such court a bond to the opposite party in such sum as such judge shall direct for all costs and damages or

simply for all costs as the said judge shall determine, if he shall fail to sustain his appeal.

In the *Sixth Circuit*, the rule is numbered 14 and reads as follows:

(1) Upon the allowance of any appeal to, or writ of error from, this court (except when allowed to ^{Supersedeas and cost} a party proceeding *in forma pauperis*, or ^{bonds.} in other case where, by statute, no bond is required), the court or judge allowing shall take and approve a bond with good and sufficient security that the appellant shall prosecute his writ or appeal to effect, and answer all costs if he fail to make his plea good.

(2) If the appeal or writ of error is to operate as a *super-sedeas*, the court or judge shall, in the allowance, order that it have such effect upon the filing of the required bond, and in such case, the bond shall be conditioned to answer all damages and costs. Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just damages for delay, and costs and interest on the appeal; but in all suits where the property in controversy necessarily follows the suit, as in real actions and replevin, and in suits on mortgages, or where the property is in the custody of the marshal under admiralty process, or where the proceeds thereof, or a bond for the value thereof, are in the custody of the court, indemnity will be required only in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit and just damages for delay, and costs and interest on the appeal.

In the *Eighth Circuit*, Clause 2 reads as follows:

“On all appeals from any interlocutory order or decree of a District Court or a judge thereof, granting, continuing, refusing, dissolving, or refusing to dissolve an injunction, or appointing a receiver the appellant shall at the time of the allowance of the said appeal file with the clerk of such District Court a bond to the opposite party in such sum as such court shall direct to answer all costs if he shall fail to sustain his appeal” (Judicial Code, sec. 129, Act March 3, 1911).

Statutory Provisions

By the seventh section of the Act of Mar. 3, 1891, creating the Circuit Court of Appeals, an appeal was allowed from any order of the Circuit Court granting or continuing an injunction. By the Act of Feb. 18, 1895, that section was so amended that an appeal was permitted to be taken from any "interlocutory order or decree granting, continuing, refusing, dissolving, or refusing to dissolve an injunction." By the Act of June 6, 1900 (31 *Stats. L.* 660), the Act of 1891 was so amended as to omit all that portion inserted by the Act of 1895, relative to an appeal from an interlocutory order or decree "refusing, dissolving, or refusing to dissolve an injunction." By the Act of April 14, 1906, the act was again amended by striking out the words "in a cause in which an appeal from a final decree may be taken under the provisions of this act to the Circuit Court of Appeals," and changing the language to read "any cause." By sec. 129 the Judicial Code, Act March 3, 1911, such appeals are allowed, with the proviso that the appeal be taken within 30 days, and proceedings in the lower court are not stayed without an order of that court, or the appellate court, or a judge thereof, and an additional bond may be required.

Decisions

An order refusing to issue a preliminary injunction is not appealable. *Omaha & S. W. R. Co. v. Chicago, St. P., M. & O. Ry. Co.*, 106 *Fed. R.* 586-587, 45 *C. C. A.* 474.

A decree granting or dissolving an injunction is not superseded by an appeal from such decree, though all the requisites for a *supersedeas* are complied with, where no order is made pursuant to (former) Equity Rule 93 (Rule 74 of the present Equity Rules). *Hovey v. McDonald*, 109 *U. S.* 150-161, 27 *L. ed.* 888.

Sureties on a bond given on appeal conditioned as required by secs. 1000-1012, *Rev. Stats.* (*U. S. Comp. Stats.* 1901, pp. 712, 716) and Rule 13 of Circuit Court of Appeals is liable not only for the costs of the appellate court but also for those in the court below. *Fidelity & Deposit Co. v. Expanded Metal Co.*, 183 *Fed. R.* 568, 106 *C. C. A.* 114.

RULE XIV—*Writs of Error, Appeals, Return, and Record*

First Circuit—(1) The clerk of the court to which any writ of error may be directed shall make a return of the same by transmitting a true copy of the record, bill of exceptions, assignment of errors, and all proceedings in the case, under his hand and the seal of the court.

Copy of record, bill of exceptions and assignment of errors to be returned.

(2) In all cases brought to this court by writ of error or appeal to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record a copy of the opinion or opinions filed in the case.

Copy of opinion of court below, when sent up.

(3) No case will be heard until a complete record, containing in itself and not by reference, all the papers, exhibits, depositions, and other proceedings which are necessary to the hearing in this court, shall be filed.

All matter shall be in record set out, and not by references, otherwise case will not be heard.

(4) Whenever it shall be necessary or proper, in the opinion of the presiding judge in any District Court that original papers of any kind should be inspected in this court upon writ of error or appeal, such presiding judge may make such rule or order for the safe-keeping, transporting, and return of such original papers as to him may seem proper; and this court will receive and consider such original papers in connection with the transcript of the proceedings.

When original papers sent up.

(5) All appeals, writs of error, and citations, must be made returnable not exceeding thirty days from the day of signing the citation, whether the return-day fall in vacation or in term time, and be served before the return-day.

Appeals; writs of error and citations returnable 30 days from signing the citation.—Must be served before return-day.

(6) The record in cases of admiralty and maritime jurisdiction shall be made up as provided in general admiralty Rule No. 52 of the Supreme Court.

Record in admiralty causes to embrace *viva voce* proof.—Cost of.

The testimony in such record shall embrace the *viva voce* proof in the District Court, if the same, or the substance thereof, has been reduced to writing with the approval of its judge. The reasonable cost of so reducing the same to writing may be taxed as a part of the costs of the record, except so far as allowed as costs in the District Court.

(7) Further proof in instance causes in admiralty shall include only that which could not with diligence have been had at the trial below, or which was there rejected, or was omitted through

What further proof had in instance causes.—No cumulative proof.

misapprehension, provided the evidence be accompanied with a certificate of counsel showing reasonable excuse for the misapprehension. Except by order of the court first obtained, merely cumulative proofs shall not be so taken; but for this purpose the evidence of witnesses who had different duties, interests, or opportunities of observation, will not ordinarily be held cumulative in cases of collision or other maritime tort.

(8) Such further proof may be taken after the appeal is allowed, in the manner provided by law for depositions *de bene esse*, or by an examiner appointed by any Circuit or District Judge, or selected by the parties, or upon interrogatories and commissions as provided in Rule 13 of the Circuit Courts of this circuit, *mutatis mutandis*. It must be taken and filed forthwith after it is obtainable, but it cannot, except by order of the court, be taken or filed within thirty days before any session at which the cause may be heard, nor thereafter until the cause has been postponed to the next term or session.

(9) Objections to further proof shall be filed with the magistrate and returned with the evidence. Within seven days after the evidence is taken, the party so objecting may file in print a motion to suppress the same, with a copy of the objections and a brief. The other party may within seven days thereafter file in print a counter-statement and brief. The objections and counter-statement, so far as they contain matters of fact *dehors* the record, shall be verified by affidavit. The court will consider the objections in advance of the trial, or in connection therewith, as it may in each case determine and without oral argument, and will order suppressed evidence not rightfully taken. The party taking the evidence so suppressed shall pay the costs arising therefrom, including the printing thereof.

(10) Nothing herein shall exclude applications for leave to take further proof, or objections thereto, in advance of the taking thereof, or objections touching the formalities of taking it; but the

latter must be brought to the attention of the court forthwith after the evidence is filed.

Second Circuit—(1) The clerk of the court to which any writ of error may be directed shall make a return of the same by transmitting a true copy of the record, bill of exceptions, assignment of errors, and all proceedings in the case, under his hand and the seal of the court.

(2) In all cases brought to this court, by writ of error or appeal, to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record a copy of the opinion or opinions filed in the case.

(3) No case will be heard until a complete record, containing in itself, and not by reference, all the papers, exhibits, depositions, and other proceedings, which are necessary to the hearing in this court, shall be filed.

(4) Whenever it shall be necessary or proper, in the opinion of the presiding judge in any District Court, that original papers of any kind should be inspected in this court, upon writ of error or appeal, such presiding judge may make such rule or order for the safe-keeping, transporting, and return of such original papers as to him may seem proper; and this court will receive and consider such original papers in connection with the transcript of the proceedings.

(5) All appeals, writs of error, and citations must be made returnable not exceeding thirty days from the day of signing the citation, whether the return-day fall in vacation or in term time, and be served before the return-day.

(6) The record in cases of admiralty and maritime jurisdiction shall be made up as provided in general admiralty Rule 52 of the Supreme Court.

In the *Third Circuit* this rule is the same as in the Second Circuit as above given, except that after the word "directed," in the first section is added the words "upon being paid or tendered his fees therefor," and except further, the printed clauses are there numbered 2 to 7 and clause 1 of the rule reads as follows:

(1) Any appeal to this court, or writ of error from this court, allowable by law, may be allowed in term time or

vacation, by the Circuit Justice, or by any of the Circuit Judges within this circuit, or by any District Judge within the district where the case to be reviewed was heard or tried, who may also take the proper security, sign the citation, and if he deem it proper so to do, grant a *supersedeas* and stay of execution or of proceedings pending such writ of error or appeal,

and the last clause as printed above has been amended to require records in admiralty "made up in the same manner, as nearly as practicable, as are the records in equity cases."

Fourth Circuit—(1) The clerk of the court to which any writ of error may be directed shall (except as otherwise provided by Rule 23) make return of the same, by certifying under his hand and the seal of said court, in accordance with the Act of Congress of February 13, 1911 (36 *Stat. L.* 901), and transmitting to the clerk of this court one of the printed transcripts of the record provided for by said Act. In all cases of appeal and also in all cases of petition for revision in bankruptcy said clerk shall likewise certify, seal and transmit a copy of the printed transcript of the record to the clerk of this court.

(2) In every printed transcript of the record the order of the parts thereof shall substantially follow the order in which the same were filed, entered or made, and shall contain a copy of such opinion or opinions of the trial judge as may have been filed. It shall be suitably indexed, and where any deposition or report of evidence requires more than one printed page the name of the deponent or witness shall be printed at the top of each page. And the foregoing shall, so far as may be applicable, apply to the printed addenda to records hereinafter provided for.

(3) Except in cases where counsel shall agree by written and signed stipulation,—which shall be a part of the record,—as to what portions of the record and proofs of the case in the court below, shall be printed in the transcript of the record for use in this court, the trial judge shall have the power, upon application after reasonable notice to the opposing party or his counsel, to determine what shall be included in such

transcript, and his determination shall be signed by him, and made part of the record; he shall include in such signed paper, such portions of the record and of the proofs as he may deem material for the proper disposition of the questions to be decided by this court, as also such parts as are specially required by these rules. But if any party desires printed any document or part of the record or proofs directed by the trial judge to be omitted, such party may print the same under separate cover and cause it to be certified and transmitted to this court as an addendum to the record. Such printing and certification shall be primarily at the cost of the party who requires it. The cover sheet of such addendum shall contain the title of the cause and shall plainly show that it is an addendum to the transcript and shall show at whose instance it was printed.

(4) Whenever it shall be necessary or proper, in the opinion of this court or of the court below, that original papers of any kind should be inspected here, this court or the court below may make such rule or order for the safe-keeping, transporting, and return of such original papers as to it may seem proper.

(5) All appeals, writs of error, and citations must be made returnable not exceeding forty days from the day of signing the citation, whether the return-day fall in vacation or in term time, and be served before the return-day.

(6) The transcript of the record in cases of admiralty and maritime jurisdiction shall include the matters which, by Admiralty Rule 52 of the Supreme Court, are required to be included therein.

(7) No transcript of the record and proofs shall (unless it be specifically otherwise ordered by the trial judge) contain a copy of the petition for writ of error or petition for appeal, the order granting writ of error or appeal, the writ of error, the appeal bond, the citation, the return of service or waiver of service of citation. In lieu thereof the originals of said documents shall be certified to this court within forty days of the date of the citation (to be returned to the court below with the mandate of this court), and in said transcript there shall be inserted a memorandum stating the date of the

petition for writ of error or for appeal, the date of the order granting writ of error or allowing appeal, the date of the writ of error and date when copy thereof or copy of order allowing appeal is lodged in the office of the clerk of the court below for adverse parties, the date, penalty, the names of the obligors, the condition (whether for payment of costs and damages or for costs alone) of the appeal bond, the date of the citation, and the date of the service thereof or of the waiver of service thereof.

No general replication in equity shall be copied into the transcript of the record, but in lieu thereof there shall be inserted a memorandum showing the date of filing of such replication and by whom filed. When a case has by writ of error or appeal been brought to this court the second time, there shall only be copied in the record the proceedings subsequent to the former writ of error or appeal. It shall be the duty of the trial judge in determining what shall constitute said transcript of the record, to direct the omission of all matter which in his judgment is unnecessary to the presentation of the issues to be passed upon by this court and especially to prevent unnecessary duplications in such transcript. And the clerk below shall not certify any transcript of the record and proofs unless it contains either the stipulation of counsel or the determination of the trial judge mentioned in sec. 3 of this rule.

(8) Whenever the printed transcript of the record or any addendum thereto as certified by the clerk of the court below shall contain any corrections or insertions, it shall be the duty of the party filing the printed transcript or addendum in this court to correct all the copies of the same so as to correspond with the certified transcript or addendum.

In the *Fifth Circuit* it is the same as in the Second as above given, except that sec. 5 thereof was amended Jan. 12, 1905, to read as follows:

All appeals, writs of error and citations must be made returnable and the transcript filed in the clerk's office at New Orleans not exceeding thirty days from the day of signing the citation, whether the return-day fall in vacation or in term time, and be served before the return-day.

"*Provided, however, that appeals taken from interlocutory decrees under the seventh section of the act entitled 'An Act to Establish Circuit Courts of Appeal and Define and Regulate in Certain Cases the Jurisdiction of the Courts of the United States and for Other Purposes,' approved Mar. 3, 1891, and amendments thereto shall be made returnable not exceeding ten days from the day of taking the same.*"

In the *Sixth Circuit* the rule is numbered 15 and reads as follows:

(1) All appeals, writs of error and citations must be made returnable not exceeding thirty days from the day of allowing the appeal in open court or signing the citation, whether the return fall in vacation or in term time, and must be served before the return day.

(2) The clerk of the District Court shall make return to any writ of error to, or appeal from, that court, by transmitting, certified under his hand and the seal of the court, a transcript of the record in the District Court, prepared as directed by other provisions of this rule. He shall make such return on or before the return day, unless the time therefor be extended as otherwise provided in these rules.

(3) In all appeals, not in admiralty (and save in cases under General Equity Rule 77), the transcript—the contents of which are to be determined pursuant to clauses (a) and (c) of General Equity Rule 75 (*Note 1*)—shall always include: (1) the statement of evidence; (2) the clerk's certificate

***Note 1.*—GENERAL EQUITY RULE 75—RECORD ON APPEAL—REDUCTION AND PREPARATION.**

In case of appeal:

(a) It shall be the duty of the appellant or his solicitor to file with the clerk of the court from which the appeal is prosecuted, together with proof or acknowledgment of service of a copy on the appellee or his solicitor, a *præcipe* which shall indicate the portions of the record to be incorporated into the transcript on such appeal. Should the appellee or his solicitor desire additional portions of the record incorporated into the transcript, he shall file with the clerk of the court his *præcipe* also within ten days thereafter, unless the time shall be enlarged by the court or a judge thereof, indicating such additional portions of the record desired by him.

(b) The evidence to be included in the record shall not be set forth

showing what portions are included by request of each party; (3) any opinion or memorandum filed by the judge pertaining to the matter involved in the appeal; (4) the pleadings affecting the decree or order appealed from, and such order or decree; (5) all proceedings relating to the appeal and the security given thereon, together with a copy of the citation, if one there was, and the evidence of service; (6) in cases removed from the State court, the full transcript on removal; and (7) in bankruptcy, shall also contain the petition for adjudication and the order thereon. It shall omit: (1) all formal proceedings to bring into court parties who afterwards appear generally, unless such proceedings are involved in the desired review; and (2) all motions or petitions filed and all affidavits in connection therewith, and all orders made and proceedings had thereon, unless such matters are involved in the desired review. It shall carry, at the beginning of each

in full, but shall be stated in simple and condensed form, all parts not essential to the decision of the questions presented by the appeal being omitted and the testimony of witnesses being stated only in narrative form, save that if either party desires it, and the court or judge so directs, any part of the testimony shall be reproduced in the exact words of the witness. The duty of so condensing and stating the evidence shall rest primarily on the appellant, who shall prepare his statement thereof and lodge the same in the clerk's office for the examination of the other parties at or before the time of filing his *præcipe* under paragraph *a* of this rule. He shall also notify the other parties or their solicitors of such lodgment and shall name a time and place when he will ask the court or judge to approve the statement, the time so named to be at least ten days after such notice. At the expiration of the time named or such further time as the court or judge may allow, the statement, together with any objections made or amendments proposed by any party, shall be presented to the court or the judge, and if the statement be true, complete and properly prepared, it shall be approved by the court or judge, and if it be not true, complete or properly prepared, it shall be made so under the direction of the court or judge and shall then be approved. When approved, it shall be filed in the clerk's office and become a part of the record for the purposes of the appeal.

(c) If any difference arise between the parties concerning directions as to the general contents of the record to be prepared on the appeal, such difference shall be submitted to the court or judge in conformity with the provisions of paragraph *b* of this rule and shall be covered by the directions which the court or judge may give on the subject.

paper, the name thereof, and the date when it was filed, omitting the title of the court and the cause and all formal endorsements. Orders and decrees shall carry a short, descriptive title with the date and entry and the name of the judge, but without other caption. Exhibits or documents shall not be duplicated, but a cross reference shall be made.

(4) Upon writ of error from this court, the contents of the transcript shall be determined and the transcript made up in the same manner provided by Clauses (a) and (c) of General Equity Rule 75 and Clause 3 of this rule, both applied as near as may be to an action at law. Such transcript shall contain also a copy of the bill of exceptions, the assignments of error and the writ of error.

(5) The original citation with proof of service and the original writ of error shall be filed with the clerk of the court below and be by him transmitted with the transcript to the clerk of this court.

(6) Whenever it shall be necessary or proper, in the opinion of the District Judge, that original papers or exhibits of any kind shall be inspected in this court upon review, he may make such rule or order as to him may seem proper for the safe-keeping, transporting and return of such original papers and exhibits; and this court will receive and consider such originals in connection with the transcript.

(7) The record, in cases of admiralty and maritime jurisdiction, shall be made up as provided in General Admiralty Rule 52.

(8) On motion duly made, or on its own motion, this court will order portions to be stricken from the transcript, or additions to be made thereto by supplementary return, as may appear proper.

In the *Seventh Circuit*, the rule is the same as in the Second Circuit, except that the following words are added to sec. 1:

“The clerk may require of the appellant or plaintiff in error, a written præcipe stating in detail what the transcript shall contain, and when a præcipe is filed shall insert a copy thereof in the transcript.”

And to sec. 5, are added these words:

“If a party be non-resident the citation and any other

writ or notice necessary in the prosecution of the appeal or writ of error may be served upon such party's counsel or attorney of record, who for such purpose may not be discharged unless another, resident, be designated of record in the case upon whom service may be made."

In the *Eighth Circuit*, Rule 14 is the same as in the Second, except that the words "and in cases at law a complete copy of the charge of the court to the jury" are added to Clause 2, and by Clause 5, appeals, writs of error, and citations are made returnable not exceeding *sixty* days from the day of signing the citation. And Clause 3 reads as follows:

No case will be heard until twenty-five copies of the printed transcript of the record, containing in themselves, and not by reference, all the papers, exhibits, depositions, sketches, drawings, photographs, maps, blueprints and other proceedings, which are necessary to the hearing in this court, printed title pages in the form prescribed in sec. 5 of Rule 26, chronological printed indexes of each and every item of their contents specifying the pages where evidence, testimony and exhibits, including those in the body of any pleading, order, or bill of exceptions may be found, and briefly naming or describing each exhibit in addition to its number, together with a statement of the numbers, names and dates of issue of any patents, shall have been filed in this court.

In the *Ninth Circuit* the 14th Rule is the same as in the Second Circuit, except that after the word "record" in Clause 1, there is added the words "opinion or opinions of the court," and Clause 2 reads as follows:

(2) "In all cases brought to this court by writ of error or appeal, to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record the original writ of error and citation, or citations issued in the cause, and a certificate under seal, stating the cost of the record and by whom paid."

And sec. 5 reads as follows:

(5) "All appeals, writs of error and citations must be made returnable at San Francisco, California, not exceeding thirty days from the day of signing the citation, whether

the return-day fall in vacation or in term time, and be served before the return-day."

NORM. In all the Circuits except the *Eighth* writs of error, appeals, and citations are returnable within 30 days from date of signing the citation. In the *Eighth Circuit* the period is 60 days.

Statutory Provisions

Sec. 1004, *Rev. Stats.* (*U. S. Comp. Stats.* 1901, p. 713) was amended by the Act of Jan. 22, 1912 (37 *Stat.* 54) to read:

Writs of error returnable to the Supreme Court or a Circuit Court of Appeals may be issued, as well by the clerks of the District Courts under the seal thereof as by the clerk of the Supreme Court or of a Circuit Court of Appeals. When so issued they shall be as nearly as the case will admit agreeable to the form of a writ of error issued by the clerk of the Supreme Court or the clerk of a Circuit Court of Appeals.

Decisions

To give the appellate court jurisdiction of a writ of error the writ must be issued and filed in the court below within the time prescribed by law, and this requirement cannot be waived by the parties. *Clark v. Doerr*, 143 *Fed. R.* 960-961, 75 *C. C. A.* 146.

The lodgment of a copy of the writ of error with the clerk of the trial court is not the equivalent of filing the writ in the court below, without which the appellate court acquires no jurisdiction.

When the original writ is returned as it should be, and shows upon its face that it was not filed in the court below the appellate court is without jurisdiction. *Mutual Life Ins. Co. v. Phinney*, 76 *Fed. R.* 617-619, 22 *C. C. A.* 425.

It is not sufficient that the original writ be lodged with the clerk. It must be endorsed, filed by the clerk. *Ib.* 621.

Judge Gilbert dissents. *Ib.* 621.

Where the writ of error returned to the appellate court by the clerk of the trial court as part of the transcript shows it was allowed by the trial judge and service thereon acknowledged by counsel of defendant in due time, it is obvious that it was lodged with the clerk in the trial court as the law requires and that he treated it as filed. The plaintiff has therefore done all that the law requires him to do to obtain a review of the proceedings and his rights should not be sacrificed because the clerk has failed to note the filing of the writ of error by an endorsement thereon. The case of *Insurance Co. v. Phinney*, 76 *Fed. R.* 617, 22 *C. C. A.* 425, not concurred in. *United States National Bank v. First National Bank*, 79 *Fed. R.* 296-302, 24 *C. C. A.* 597.

The requirements of the law are satisfied when the record shows that the writ of error was actually lodged with the clerk. It is the

lodgment of the writ with that officer rather than the notation of the filing which renders it operative. *Ib.* 303.

Where the writ of error has been actually sued within the time allowed by law a defect therein may be corrected by amendment under sec. 1005, *Rev. Stats. (U. S. Comp. Stats., 1901, p. 714)* by inserting the name of a party omitted, although the time within which an original writ of error could be sued out has expired. *Gilbert v. Hopkins*, 198 *Fed. R.* 849, 118 *C. C. A.* 491.

In such case the new party must be brought in by a new citation. *Ib.*

Where within the time allowed by law, the appeal papers in due form are presented to another judge of the same court, the judge who made the decree appealed from being absent, but no allowance of the appeal was made within the allowed time because the judge to whom the order for allowance was presented declined to act, the judge who made the decree may thereafter, properly allow the appeal *nunc pro tunc*. *J. D. Randall Co. v. Foglesong Mach. Co.*, 200 *Fed. R.* 741, 119 *C. C. A.* 185.

It is not ground to dismiss an appeal, because the citation is not returnable on or before the first day of the next term of the appellate court. There is no rule which requires the citation to be returnable on or before the first day of the next ensuing term of the Circuit Court of Appeals. *Farmers' Loan & Trust Co. v. Chicago & N. P. R. Co.*, 73 *Fed. R.* 314-317, 19 *C. C. A.* 477.

When a bond has been approved by one of the judges of the Circuit Court another judge of that court, who might have granted the appeal and approved the bond, may sign the citation, a more liberal construction having been given by later cases to sec. 999, *Rev. Stats. (U. S. Comp. Stats. 1901, p. 712)*, than announced in the case of *Insurance Co. v. Mordecai*, 21 *How.* 195-202, 16 *L. ed.* 94. *Ib.* 316.

The limitation of time within which to enter an appeal is not strictly a limitation, but a condition of the right granted by the statute. The statute allows *supersedeas* in exceptional cases specifically guarded, and in theory of law the record of the case remains in the trial court pending judgment of the appellate court.

Where a writ of error is taken from the District Court to the Supreme Court if plaintiff has doubts as to the jurisdiction of that appellate court he should also sue out a writ of error to the Circuit Court of Appeals within the six months allowed by law. *Hubbard v. Worcester Art Museum*, 196 *Fed. R.* 871, 116 *C. C. A.* 435.

It is not a valid objection that the writ of error was returned and the record filed in the appellate court one day after it was made returnable. *Altenburg v. Grant*, 83 *Fed. R.* 980-981, 28 *C. C. A.* 241.

Where the record was not filed in the appellate court before the return-day and no order enlarging the time was asked before such return-day, but the record was filed, and the cause docketed before a motion to dismiss was made, *Held*, on the authority of *Owens v. Tiernen*, 10 *Pet.* 24, that the motion to dismiss should be denied. *Andrews v. Thum*, 64 *Fed. R.* 149-153, 12 *C. C. A.* 77.

Where the record fails to show that any writ of error was actually issued in the case, the appeal must be dismissed. *Smith v. Ferst*, 66 *Fed. R.* 798, 14 *C. C. A.* 96.

And this though the writ of error was allowed with a *supersedeas*, and the *supersedeas* bond was approved and filed. *Ib.*

The rules of the Circuit Court of Appeals in regard to the term-day of appeals and to the filing of transcripts are directory. It is within the sound discretion of the court to relieve parties who have not complied therewith. *State of Florida v. Charlotte Harbor Phosphate Co.*, 70 *Fed. R.* 883-886, 17 *C. C. A.* 472.

In a case where the return-day was not named in the order allowing the appeal, yet at the time of the allowance of the appeal, appellee's counsel was in court and had full knowledge of the proceedings, and the transcript was presented to the clerk before the first term of the appellate court, *Held*, that the court in its sound discretion might relieve the parties who had failed to comply with Rule 14. *Ib.* 886.

Where an appeal is allowed in open court and perfected during the term at which the decree was rendered, no citation is necessary. Where the appeal is allowed at the term of the decree or judgment, but not perfected until after the term, the citation is necessary to bring in the parties. But if the appeal be docketed in the Supreme Court at the next ensuing term, or the record reaches the clerk's hands seasonably for that term, and legal excuse exists for lack of docketing, a citation may be issued by leave of the court, although the time for taking the appeal has elapsed. *Jacobs v. George*, 150 *U. S.* 415-416, 37 *L. ed.* 1127.

Where the appeal is allowed at the term subsequent to that of the decree or judgment the citation is necessary, but may be issued properly returnable even after the expiration of the time for taking the appeal, if the allowance of the appeal is before.

A citation is one of the necessary elements of the appeal taken after the term, and if it is not issued and served before the end of the next ensuing term of the appellate court and not waived, the appeal becomes inoperative. *Ib.* 416.

A citation to the appellate court is not jurisdictional. Its only purpose is to give notice to the appellees that the appeal will be prosecuted and secure them a fair opportunity to present their case. The

omission to issue citations, if by accident or mistake, will not cause the appeal which is a matter of right to be dismissed before an opportunity to give the requisite notice has been furnished, whether the application for the citation is made before or after the statutory time for the appeal has elapsed. *Lockman v. Lang*, 132 *Fed. R.* 4, 65 *C. C. A.* 621.

In an appellate court an appearance by counsel does not preclude a motion to dismiss for want of jurisdiction or on any other sufficient ground—except want of citation or mere irregularity in the proceedings. *United States v. Yates*, 6 *How.* 605, 12 *L. ed.* 575.

Citation is notice to the party, and his appearance in person or by attorney is an admission of notice on the record, and may not be withdrawn. *Ib.*

Rule 14 of the Circuit Court of Appeals, First Circuit, requires appeals, writs of error, and citations to be made returnable, and the transcript filed not exceeding thirty days from the day of signing the citation, whether the return-day fall in vacation or term, and to be served before the return-day, except appeals taken from interlocutory decrees under sec. 7 of the Act of Mar. 3, 1891, which are returnable within ten days. *Held*, that an appeal would not be dismissed because a citation in error issued is not made returnable within thirty days of the day of signing, and the transcript was not filed in the clerk's office within thirty days of the day of signing the citation, where the appellees have duly appeared and no injury has resulted because of this non-compliance with the rules, which are held to be directory but not jurisdictional. *Love v. Busch*, 142 *Fed. R.* 429-431, 73 *C. C. A.* 545.

Where no citation has been sued out of either the trial court or the appellate court the appeal will be dismissed. *Peace River Phosphate Co. v. Edwards*, 70 *Fed. R.* 728, 17 *C. C. A.* 358.

The citation should be signed by the judge or justice and direct the appellees to appear within thirty days, but when the transcript has been filed and appellees have entered a regular appearance, a citation, defective because not signed by the judge and returnable more than thirty days from the day of the signing, is cured. *Freeman v. Clay*, 48 *Fed. R.* 849-850, 1 *C. C. A.* 115.

The last clause of the eleventh section of the act creating the Circuit Court of Appeals makes the practice in respect to appeals and writs of error in the Supreme Court applicable to appeals in the Circuit Court of Appeals, and where an appeal is granted after the expiration of the term at which the decree was rendered, it is ineffective without a citation issued returnable at the same term with the appeal. *West v. Irwin*, 54 *Fed. R.* 419-420, 4 *C. C. A.* 401.

It is proper for the clerk to require of counsel of the appellant or plaintiff in error a præcipe stating specifically what the transcript shall contain, and to attach a copy of this præcipe to the transcript and certify that it is a true and correct transcript according to the præcipe. *Burnham v. N. Chicago St. R. Co.*, 87 *Fed. R.* 168-170, 30 *C. C. A.* 594.

"All proceedings in the case," in the first clause of Rule 14 are to be read with reference to the language of the third clause. *Ib.* 170.

The jurisdiction of the appellate court, which attaches upon the filing of the writ of error in the office of the clerk of the Circuit Court, is not defeated by an irregular certificate to the transcript. *Ib.* 169.

In the absence of a controlling stipulation by the parties, or of written instructions from the plaintiff in error, or appellant, filed in the case, transcripts in cases of writs of error or appeal should meet the requirements of Rule 14, and the clerk's certificate should follow the language of the rule and show that the transcript transmitted is "a true copy, etc." *Pennsylvania Co., etc., v. Jacksonville, T. & K. W. R. Co.*, 55 *Fed. R.* 131-132, 5 *C. C. A.* 53.

If the clerk's certificate shows that certain parts of the record were omitted from the transcript by direction of appellant's attorney, when it does not appear that the omitted parts are necessary for the hearing, it is sufficient, and the appeal will not be dismissed for that reason. *Nashua & Lowell Ry. Cor. v. Boston & Lowell Ry. Cor.*, 61 *Fed. R.* 237-245, 9 *C. C. A.* 468.

The transcript on appeal need not always contain all the proof, entries, papers, and proceedings below. *Ib.* 244.

The clerk may ordinarily receive joint directions from the solicitors and attorneys to make up the transcript on appeal. In the absence of a joint stipulation the clerk must decide as to the selection made by appellant's solicitor, as to what the transcript shall contain. He may well refuse to certify a transcript with palpable and substantial omissions, in which event the appellant has his remedy by applying to the appellate court for a mandamus, or perhaps by seeking some instructions to the clerk from the court appealed from. *Ib.*

Ordinarily the whole of the common-law record, and of the corresponding portions in equity as designated in sec. 750, *Rev. Stats.*, should be brought up. *Ib.* 243.

The appropriate and ordinary remedy for an appellee in case of a defective transcript is to suggest diminution, and ask for certiorari, though the court may sometimes order the latter of its own motion. *Ib.* 245.

A certificate stating that certain numbered papers "is a true, full, and complete transcript of so much of said record and proceedings as now appear and is of file and of record in my office," is insufficient,

but where the record shows that the records and files were destroyed by fire, and is silent as to which party is in fault, in not fully re-establishing the record, the record as certified should be considered. *Cutting v. Taveres A. & Ar. Co.*, 61 *Fed. R.* 150-155, 9 *C. C. A.* 401.

An appellate court will not submit to be called on by mandamus to settle in advance whether a certain paper is or is not a part of the record, where there is a dispute between counsel and the clerk. *Starcke v. Klein*, 62 *Fed. R.* 502-503, 10 *C. C. A.* 445.

Neither the counsel for appellant nor the clerk can conclusively determine what parts of the record are necessary on appeal; when, therefore, the certificate of the clerk does not show that the record is a full and complete record of the entire proceedings, it ought to appear by stipulation of counsel or otherwise that it does include all that is necessary to a determination of the matters involved in the appeal. *Cunningham v. German Ins. Bank*, 103 *Fed. R.* 932-934, 43 *C. C. A.* 377.

The transcript should contain no immaterial matter, and if the transcript as filed is deemed by the appellee not sufficiently full, he should seasonably move the court to require the appellant to complete the record by filing a transcript of such other papers and evidence as he deems necessary and points out. *Ib.* 934.

The general rule is that the plaintiff in error or appellant is responsible for the condition of the record in the appellate court. When he designates the portion of the proceedings below to be certified, the clerk of the trial court should follow his directions, and leave the opposing parties to procure any omitted portions of the proceedings by a writ of certiorari, or other permissible proceeding. Where no directions are given the clerk he should be careful that the transcript contains a copy of everything specified in Rule 14 which is necessary to the hearing, and that his certificate shows this fact. *Teller v. United States*, 111 *Fed. R.* 119-120, 49 *C. C. A.* 263.

The fact that papers not in the judgment roll are in the transcript and certified to by the clerk, does not make them any part of the record on writ of error. *Duncan v. Atchison, T. & S. F. R. Co.*, 72 *Fed. R.* 808-812.

Such papers can only be made part of the record by bill of exceptions, or an agreed statement of facts or some other way recognized by the rules of practice. *Ib.* 812.

No alleged errors concerning the rulings of the Circuit (District) Court on the trial of a cause without a jury can be examined in the Circuit Court of Appeals, unless it affirmatively appears upon the record that there was a written stipulation waiving the jury, signed by the respective counsel. *Ib.* 810.

New evidence cannot be introduced into the record after the judgment rendered, by giving notice to the opposite party that appellant thinks such evidence necessary for the consideration of the court on appeal. Such foreign matter tacked onto the record has no official sanction whatever, and constitutes no part of the record. *Board of Commissioners v. King*, 67 *Fed. R.* 945-946, 15 *C. C. A.* 93.

The Circuit Court of Appeals is without jurisdiction to allow an amendment of the record sent up from the trial court. *Jackson Co. v. Gardiner Inv. Co.*, 118 *C. C. A.* 294.

The appellate court upon its own motion may reverse a decree and remand it to the trial court with directions to take further proofs where the case is not properly prepared for a decree, if great injustice would be done to decide the case on the record sent up. *Barber v. Coit*, 118 *Fed. R.* 272, 55 *C. C. A.* 145.

It is not indispensable that exceptions taken during the progress of the trial should appear by the bill of exceptions, and that they cannot be shown by anything else; the decisions which support this proposition were in cases where the exceptions relied on were shown by the transcript to have rested in the clerk's or judge's minutes, which are no part of the record. Where all the proceedings upon which the exception is based, including the action of the court and the objection and exception of the party, are made a matter of record upon the journal of the court, while this is not the form employed by the common-law practice, it is not beyond the power of the court to so exhibit the exception. It is nothing but a matter of form, and the appellate court would not be justified in ignoring vital exceptions so appearing in the record. *Wilson v. Pauley*, 72 *Fed. R.* 139-142.

Where a jury is waived and the cause tried by the court no appeal may be had on any questions except those which arise in the progress of the trial, as for example, objections to the admission of material evidence, or which would arise on general demurrer, or may be taken as questions of law arising on findings of ultimate facts. *Ib.*

In a cause tried by a judge, a jury trial being waived, where the record was made up on a bill of exceptions such as is filed on jury trials, the court looked to the opinion to ascertain the finding of facts, the general or special finding of facts required by secs. 649 and 700, *Rev. Stats. (U. S. Comp. Stats. 1901, pp. 525-570)* not having been made. *Ib.*

Ordinarily, an opinion is no part of the record, and is not to be referred to except to indicate the views of the law of the judge of the trial court. *Continental, etc., Bank of Chicago v. Cobb*, 200 *Fed.* 511, 118 *C. C. A.* 615-622.

RULE XV—*Translations*

Whenever any record transmitted to this court upon a writ of error or appeal shall contain any document, paper, testimony, or other proceeding in a foreign language, and the record does not also contain a translation of such document, paper, testimony, or other proceeding, made under the authority of the inferior court, or admitted to be correct, the record shall not be printed, but the case shall be reported to this court by the clerk, and the court will thereupon remand it back to the inferior court, in order that a translation may be there supplied and inserted in the record.

Where no translation accompanies a paper in foreign language, record remanded.

NOTE. This rule is numbered 18 in the *Third Circuit*, and is omitted from the rules of the *Sixth Circuit*.

RULE XVI—*Docketing and Dismissing Cases*

First Circuit—(1) The plaintiff in error or appellant shall docket the case and file the record thereof on or before the return-day, whether in vacation or in term time. But for good cause shown the justice or judge, who signed the citation, or any Time may be enlarged. (circuit or) district judge, may enlarge the time, the order of enlargement to be filed in this court.

Case docketed and record to be filed before return-day.

(2) If the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the cause docketed and dismissed upon producing a certificate, whether in term or vacation, from the clerk of the court wherein the judgment or decree was rendered, stating the case, the return-day of the citation and that the writ of error or appeal was duly sued out or allowed. And the plaintiff in error or appellant shall not be entitled to docket the case or file the record, after the same shall have been docketed and dismissed under this rule, unless by order of the court after notice to the adverse party. But the defendant in error or appellee may, at his option, docket the case and file the record; and if the case is docketed and the record filed by the plaintiff in error or appellant within the time prescribed by this rule, or by the defendant in

On default, defendant in error or appellee may have cause docketed and dismissed or may file the record.

error or appellee at any time thereafter, the case shall stand for argument.

(3) Upon the filing of the *record* the *ap-* On filing transcript, ap-
pearance of the counsel for the party pearance of counsel of
party docketing entered.
docketing the case shall be entered.

In the *Second, Seventh, Eighth, and Ninth Circuits* the rule is substantially the same as in the First Circuit, except that in the first section its first sentence reads: "It shall be the duty of the plaintiff in error or appellant to docket the case and file the record thereof with the clerk of this court by or before the return-day, whether in vacation or in term time." And in the *Ninth Circuit* the words "at San Francisco, California," are inserted between the words "clerk of this court," and "by or before," and in this and the Second Circuits the words "at the term," end the 2d section.

In the *Third Circuit*, the rule is numbered 17. Clause 1 is substantially as printed above.

Clauses 2, 3 and 4 read as follows: (2) If the plaintiff in error or appellant shall fail to comply with the first section of this rule, the defendant in error or appellee may cause the case to be docketed, without the filing of any record, and may have it dismissed, whether in term time or vacation, upon due proof of notice to the plaintiff in error or appellant of a motion for such dismissal, and upon producing a certificate from the clerk of the court wherein the judgment or decree was rendered, stating the case, the return-day of the citation, and that the writ of error or appeal was duly sued out or allowed; and in no case shall the plaintiff in error or appellant be entitled to file the record or to have it docketed after the defendant in error or appellee shall have had the case dismissed under this section of this rule, unless by special order of the court.

(3) Instead of having the case docketed for the purpose of having it dismissed under the provisions of the second section of this rule, the defendant in error or appellee, on payment of the usual fees, may file the record and cause the case to be docketed by the clerk, and if the record be filed and the case docketed, either by the plaintiff in error or appellant, within

the time prescribed by the first section of this rule, or by the defendant in error or appellee under the provisions of this section, the case shall stand for argument.

(4) On the filing of the record the appearance of the counsel for the party docketing the case shall be entered, and on or before the return-day of the citation the counsel for the appellee or defendant in error shall also enter appearance for the appellee or defendant in error.

In the *Fourth Circuit* the rule reads as follows:

(1) Except as otherwise provided by Rule 23, it shall be the duty of the appellant, plaintiff in error, or petitioner for revision in bankruptcy to cause to be printed and suitably indexed the transcript of the record (as well as any addendum to the record required by such party) and to deliver the same to the clerk or deputy clerk of the court below for certification, sealing and transmission to this court within forty days from the date of the citation or the filing of the petition for revision; and also on or before the expiration of the said forty days to file with the clerk of this court at least twenty-four printed copies of the said transcript and addendum above-mentioned, if any. He shall also at the same time furnish to the adverse party at least three copies of the printed transcript of the record, including any addendum thereto printed at his instance. It shall also be the duty of appellant, plaintiff in error or petitioner for revision to docket the cause in this court on or before the return day, whether in term time or vacation. In case any appellee or defendant in error shall have required an addendum to the transcript of record, it shall be the duty of such party to file in the office of the clerk of this court, on or before the said return day, at least twenty-four printed copies of such addendum as well as one additional copy thereof, which shall have been duly certified by the clerk of the court below; and such party shall at the same time furnish to the adverse party at least three copies of said printed addendum.

The time within which any of the acts in this section above mentioned are required to be done may for good cause shown be enlarged by the justice or judge who signed the citation or any judge of this court, provided the order of enlarge-

ment be made prior to the expiration of such time; such order to be filed with the clerk of this court.

(2) If the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the cause docketed and dismissed upon producing a certificate from the clerk of the court wherein the judgment or decree was rendered, stating the case and certifying that such writ of error or appeal has been duly sued out or allowed. And in no case shall the plaintiff in error or appellant be entitled to docket the case and file the transcript of the record after the same shall have been docketed and dismissed under this rule, unless by order of the court.

(3) But the defendant in error or appellee may, at his option, docket the case and file a copy of the record with the clerk of this court; and if the case is docketed and a copy of the record filed with the clerk of this court by the plaintiff in error or appellant within the period of time above limited and prescribed by this rule, or by the defendant in error or appellee at any time thereafter, the case shall stand for argument at the term.

(4) Upon the filing of the transcript of the record in any case brought up by writ of error or appeal, the appearance of counsel for the party docketing the cause shall be entered by the clerk of this court as of course.

(5) Defendants in error, or appellees, are required, at the time of entering their appearance by attorney, to make a deposit of \$20.00, for account of costs to be incurred by them in this court. In case of affirmance, or dismissal, when all costs shall have been paid by the plaintiff in error, or appellant, the said deposit will be returned. This is applicable to all cases except when the United States is defendant in error or appellee.

For the *Fifth Circuit* the rule is as in the First Circuit except that when amended on June 20, 1895, the words "the justice or judge who signed the citation" in the first clause were omitted and on April 23, 1895, the following clause was added:

(4) "In all cases the plaintiff in error or appellant on docketing a case and filing the record, shall enter into an

undertaking with the clerk, with surety to his satisfaction for the payment of his fees, or otherwise satisfy him in that behalf."

For the *Sixth Circuit* the rule is numbered 18 and is substantially as given in the First Circuit, except that there is inserted at the end of the first sentence of the first section and as a part of it these words: "And at the time of filing the record, the plaintiff in error or appellant shall deposit with the clerk the sum of thirty-five dollars as security for costs except in cases in which the proper showing is made and an order of this court is entered thereon allowing the cause to proceed *in forma pauperis*." And there are added Clauses 5 and 6 reading as follows:

(5) All subsequent papers filed, orders made and proceedings had shall be noted upon the docket.

(6) Whenever counsel for appellant and appellee shall in vacation sign and file with the clerk an agreement in writing, directing the case to be dismissed and specifying the terms as to costs, on which terms it is to be dismissed, and shall pay to the clerk any fees due, he shall enter the case on his docket as dismissed and give to either party requesting it a copy of the agreement filed, but no mandate or other process on such dismissal shall be issued without the order of the court, and Clause 1 reads as follows: (1) The clerk shall enter upon the docket in their proper chronological order all cases brought to or in this court.

In the *Eighth Circuit* the following note is added at the end of the rule: "Note. A deposit of thirty-five dollars to secure clerk's costs is required before the record in a cause is filed and docketed."

Decisions

Rule 16 is essentially the same as Rule 9 of the Supreme Court as to which that court said: "The rule of the court for docketing and dismissing causes has never been applied in any case, where before the motion is made the cause has been actually placed on the docket." *West Chicago St. R. Co. v. Ellsworth*, 77 *Fed. R.* 664-665, 23 *C. C. A.* 393.

The purpose of the rule is to enable appellee to secure the dismissal of an appeal where it becomes apparent by a proper showing that appellant is not prosecuting his appeal diligently under the rules, or that the appeal

has not been taken in good faith but for delay only. *Sutherland v. Pearce*, 186 *Fed. R.* 783, 108 *C. C. A.* 653.

A district judge who is not a member of the Circuit Court of Appeals and who did not sign the citation, although he allowed the appeal, cannot make an order enlarging the time for filing the record. *West v. Irwin*, 54 *Fed. R.* 419-420, 4 *C. C. A.* 401.

Where the judge who tried the case signed the citation, a judge of another district when holding court for the judge who tried the case and in his district may make an order in the case extending the return to the writ of error sued out. *Hall v. M'Kinnon*, 193 *Fed. R.* 572, 113 *C. C. A.* 440.

Where the record was not filed in the appellate court within the time prescribed by the rule, because the office of the clerk was closed, it was held that that was sufficient excuse for the default. *Farmers Loan & Trust Co. v. Chicago & N. P. R. Co.*, 73 *Fed.* 314-317, 19 *C. C. A.* 477.

Where it is not alleged that appellant has failed to give the undertaking for costs required by a rule of the court, or to pay the clerk the estimated costs and fees for printing the record, it will not be ground for dismissal that the record has not been printed. *Ib.* 317.

Where the record is filed within the time prescribed by Rule 16 the appellant is not responsible if the printed copies of the record and of the brief are not filed within a prescribed number of days before the term, in conformity with other rules. *Jones v. Mann*, 72 *Fed. R.* 85, 18 *C. C. A.* 442.

Rule 14, Eighth Circuit, requires appeals, writs of error, and citations to be made returnable not exceeding sixty days from the date of signing the citation.

Rule 16, Circuit Court of Appeals Rules, requires the filing of the record by or before the return-day. *Held*, that where a transcript of the record was filed within sixty days of the signing of the citation and within the time specified therein, but after the return-day of the writ of error, and the failure to file it before that return-day has not continued the hearing of the case over any term of the court, when no motion to dismiss the writ was made until the expense of printing the transcript was incurred, the writ should not be dismissed on motion. *Town of Gilman v. Furnald*, 141 *Fed. R.* 940, 72 *C. C. A.* 666.

Where, by mistake of the clerk, the date of the filing of the transcript and docketing the case is prior to the date of the decree appealed from, the court by order will make the record speak the truth. *Elder v. McCloskey*, 70 *Fed. R.* 529-560, 17 *C. C. A.* 251.

The order enlarging the time in which to file the record must be filed with the clerk of the Court of Appeals, and this duty belongs to

the party procuring the order. *State of Florida v. Charlotte H. P. Co.*, 70 *Fed. R.* 883-885, 17 *C. C. A.* 447.

RULE XVII—*Docket and Calendars*

First Circuit—(1) The clerk shall enter and number on the docket all cases consecutively, in their proper chronological order.

(2) He shall print at least twenty days before the first Tuesday of October and of January, and the second Tuesday of April, a calendar of all the pending cases, arranged by districts in the following order: Maine, New Hampshire, Rhode Island, Massachusetts.

Second, Fifth, and Eighth Circuits—(1) The clerk shall enter upon a docket all cases brought to and pending in the court in their proper chronological order and such docket shall be called at every term, or adjourned term; and, if a case is called for hearing at two terms successively, and upon the call at the second term neither party is prepared to argue it, it will be dismissed at the cost of the plaintiff in error or appellants, unless sufficient cause is shown for further postponement.

In the *Third Circuit* the rule is numbered 18 and reads as follows:

(1) Upon the filing of the record in any case by the plaintiff in error or appellant and the payment by him of a deposit fee of twenty-five dollars, the clerk shall enter the case, the record of which is so filed, upon the docket of this court; such docket shall have all its cases arranged in their proper chronological order.

(2) The clerk shall prepare and cause to be printed, previous to the opening of each term of this court, an Argument List of all cases the records of which shall have been filed with him not less than fifteen days before the opening of the term, which cases shall be put on the Argument List in the chronological order of docketing the same, subject, however, to the following system of grouping: The first group shall be composed of the cases in which all the circuit judges shall be competent to sit; the second, of the cases in which all the

circuit judges except the youngest in commission shall be competent to sit; the third, of the cases in which all the circuit judges except the next to the youngest in commission shall be competent to sit, and the fourth, of the cases in which all the circuit judges except the oldest judge in commission shall be competent to sit.

And a rule numbered 19 entitled Arguments, Continuances and Dismissals has been adopted reading as follows:

(1) The cases in the Argument List shall be called for argument at each term, or adjourned term, and cases shall be argued on call unless the court shall for good cause otherwise order.

(2) If the defendant in error or appellee fails to appear when his case is called for argument, the court may proceed to hear the argument on the part of the plaintiff in error or appellant and to give judgment according to the right of the case.

(3) For good cause shown the court may order the continuance of any case for the term.

(4) When a case is reached in the regular call, and there is no appearance for either party, it may be dismissed at the cost of the plaintiff in error or appellant.

(5) Where no counsel appears for the plaintiff in error or appellant, and no brief has been filed for him, the defendant in error or appellee may have the writ of error or appeal dismissed at the cost of the defaulting party.

(6) If a case is called for argument at two terms successively, and upon the call at the second term neither party is prepared to argue it, it will be dismissed at the cost of the plaintiff in error or appellant unless a sufficient cause is shown for further postponement.

(7) Whenever the plaintiff and defendant in a writ of error pending in the court, or the appellant and appellee in an appeal, shall, by their attorneys of record, sign and file with the clerk an agreement in writing directing the case to be dismissed, and specifying the terms on which it is to be dismissed, as to costs, and shall pay to the clerk any fees that may be due to him, it shall be the duty of the clerk to enter the case dismissed, and to give to either party requesting it a

copy of the agreement filed; but no mandate or other process shall issue without an order of the court.

(8) Cases may also be dismissed in accordance with the second section of Rule 17, the first section of Rule 23 and the fourth section of Rule 24 of this court.

(9) Except as in the preceding sections of this rule it is otherwise provided, no motion to dismiss a writ of error or an appeal will be heard unless previous notice of the motion has been given to the plaintiff in error or appellant or his counsel.

In the *Fourth Circuit* the rule is as follows:

(1) The clerk shall enter upon a docket all cases brought to and pending in the court in their proper chronological order.

(2) All cases in which copies of the printed record are delivered to the adverse party or his counsel at least twenty days before any regular term or adjourned term shall stand for argument at the term or adjourned term held next after the docketing of the case.

(3) The clerk before each regular term shall print a docket containing all pending cases and such docket shall be called at every term or adjourned term. If a case is called for hearing at two terms successively, and upon the call at the second term neither party is prepared to argue it, it will be dismissed at the cost of the plaintiff in error, appellant or petitioner for revision, unless sufficient cause is shown for further postponement.

(4) By consent of counsel in writing filed with the clerk of this court, any cases not included in sec. 2 of this rule may be by the clerk placed at the foot of the argument docket, and may be argued at any term or adjourned term, provided the briefs on both sides are filed before the case is called.

In the *Sixth Circuit* Rule 17 covers proceedings *In Forma Pauperis*.

In the *Seventh Circuit* the rule reads as follows:

The clerk shall prepare calendars of causes for the regular terms of this court, to be held on the first Tuesday of October in each year, and for each adjourned session; placing thereon in proper chronological order only cases in which

the *record* shall have been printed fully thirty days before such term or session and those causes in which, the record having been printed, briefs upon both sides have been filed seven days before the beginning of the term or session.

In the *Eighth Circuit* the rule is as in the *Second Circuit* except there are added after the words "or adjourned term" in Clause 2 the words "except cases from the districts of Colorado, Utah, Wyoming and New Mexico which cases shall only be called at the September term unless counsel otherwise stipulate as provided in Rule 3."

For the *Ninth Circuit*, the rule is as follows:

The clerk shall, upon payment to him by the appellant or plaintiff in error of a deposit of twenty-five dollars (\$25.00) in each case, file the record and enter upon a docket all cases brought to and pending in the court in their proper chronological order.

RULE XVIII—*Certiorari*

No certiorari for diminution of the record will be hereafter awarded in any case, unless a motion therefor shall be made in writing, and the facts on which the same is founded shall, if not admitted by the other party, be verified by affidavit. And all motions for such certiorari must be made at the first term of the entry of the case; otherwise, the same will not be granted, unless upon special cause shown to the court, accounting satisfactorily for the delay.

Motion to be in writing,
setting out the facts.

Must be made at the
first term.

NOTE. In the Third Circuit this rule is numbered 20. There is no corresponding rule in the Sixth Circuit.

Decisions

Upon the record being filed if any omission or addition is found relief can be had by either party by certiorari. *Blanks v. Klein*, 49 *Fed. R.* 1, 1 *C. C. A.* 139.

Presumptively the transcript filed over the certificate of the clerk contains a complete record, and the hearing can be had only upon the record brought from the trial court. Such record cannot be amended by certiorari upon *ex parte* affidavit so as to get matter into the record which appellant claims was introduced at the hearing before the master,

but which the master states he has no recollection of. *Randolph v. Allen*, 73 *Fed. R.* 23-32, 19 *C. C. A.* 353.

Where exceptions are taken in the trial court in a cause tried by the court, and there is no evidence to support the findings of facts, and motion is made to dismiss the appeal because the record does not set out all the evidence introduced below, if there is any material omission in the record the proper remedy is by motion for certiorari and not a motion to dismiss. *Merill v. Floyd*, 50 *Fed. R.* 849-850, 2 *C. C. A.* 58.

A motion to dismiss an appeal because a transcript is imperfect should point out what, if any, of the omitted parts are material, and the appellee upon a suggestion duly made may ask for a certiorari to correct the transcript. *Nashua & L. R. Cor. v. Boston & L. R. Cor.*, 51 *Fed. R.* 929-931, 2 *C. C. A.* 542.

RULE XIX—*Death of a Party*

(1) Whenever, pending a writ of error or appeal in this court, either party shall die, the proper representatives in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the suit, and thereupon the case shall be heard and determined as in other cases; and, if such representatives shall not voluntarily become parties, then the other party may suggest the death on the record, and thereupon, on motion, obtain an order that unless such representatives shall become parties within sixty days, the party moving for such order, if defendant in error (or appellee as the rule in the 4th Circuit reads), shall be entitled to have the writ of error or appeal dismissed, and, if the party so moving shall be plaintiff in error (or appellant in the 4th Circuit), he shall be entitled to open the record, and, on hearing, have the judgment or decree reversed, if it be erroneous: *Provided, however*, that a copy of every such order shall be personally served on said representatives at least thirty days before the expiration of such sixty days.

(2) When the death of a party is suggested, and the representatives of the deceased do not appear within ten days after the expiration of such sixty days, and no measures are taken by the

Legal representative may be admitted as party.—In default upon suggestion of death, may be compelled to come in or cause be dismissed.

Cause to abate on default after notice.

opposite party within that time to compel their appearance, the case shall abate.

(3) When either party to a suit in a Circuit or District Court of the United States shall desire to prosecute a writ of error or appeal to this court, from any final judgment or decree rendered in the Circuit or District

Proceedings, where party dead, after decree and before appeal, with representative in another State.—Notice.—Abatement on default.

Court, and at the time of suing out such writ of error or appeal, the other party to the suit shall be dead and have no proper representative within the jurisdiction of the court which rendered such final judgment or decree, so that the suit cannot be revived in that court, but shall have a proper representative in some State or Territory of the United States, or in the District of Columbia, the party desiring such writ of error or appeal may procure the same, and may have proceedings on such judgment or decree superseded or stayed in the same manner as is now allowed by law in other cases, and shall thereupon proceed with such writ of error or appeal as in other cases. And within thirty days after the filing of the record in this court the plaintiff in error or appellant shall make a suggestion to the court, supported by affidavit, that the said party was dead when the writ of error or appeal was taken or sued out, and had no proper representative within the jurisdiction of the court which rendered such judgment or decree, so that the suit could not be revived in that court, and that said party had a proper representative in some State or Territory of the United States, or in the District of Columbia, and stating therein the name and character of such representative, and the State or Territory or District in which such representative resides; and upon such suggestion, he may on motion obtain an order that, unless such representative shall make himself a party within ninety days, the plaintiff in error or appellant shall be entitled to open the record, and, on hearing, have the judgment or decree reversed if the same be erroneous: *Provided, however,* that a proper citation reciting the substance of such order shall be served upon such representative, either personally or by being left at his residence, at least thirty

days before the expiration of such ninety days: *Provided, also*, that in every such case, if the representative of the deceased party does not appear within ten days after the expiration of such ninety days, and the measures above provided to compel the appearance of such representative have not been taken within the time as above required, by the opposite party, the case shall abate: *And provided, also*, that the said representative may at any time before or after said suggestion come in and be made a party to the suit, and thereupon the case shall proceed, and be heard and determined as in other cases.

NOTE. In the Third Circuit this Rule is numbered 21.

In the *Sixth Circuit*, the rule is numbered 16 and reads as follows:

(1) Whenever a party to a case pending in this court shall die, the personal representative may suggest the death upon the record, filing evidence of his representative capacity, and designating counsel, and thereupon the case shall stand as revived in behalf of or against the interest of the deceased party, and the cause shall proceed as in other cases.

(2) Where a party to a case pending in this court shall die and his personal representative does not, within sixty days after such death, appear under Clause 1, any other party in interest may suggest such death upon the record, filing evidence of the due appointment of a personal representative, and thereupon, and without notice, the court or any judge thereof will make an order that such personal representative appear and designate counsel. In default of such appearance, within thirty days after service on such personal representative of a certified copy of such order, the adverse party, on proof of such service and without further notice, may have, from this court, an order either to revive the cause and direct that it proceed as to the interest held by the deceased party or to dismiss the case as to such interest, as may be by the court thought proper.

(3) If the death of a party is brought to the attention of this court, and proceedings are not taken under Clause 1 or Clause 2 sufficiently to dispose of the resulting situation,

the court will, on its own motion, direct such steps to be taken as are proper to dispose of the case or expedite the hearing.

(4) Whenever any party to a suit pending in a District Court shall die, and because of such death and because of the absence of any personal representative of the deceased within the jurisdiction of the District Court and any means of compelling the appointment of such a representative within such jurisdiction the adverse party is not able to have the case revived in the District Court and to proceed with the desired review in this court, the adverse party desiring a review may proceed as if such death had not occurred, and may have *supersedeas* as in other cases, serving all required papers and notices upon such persons as, in the judgment of the District Court, will be most likely to give notice to all persons interested in the estate, and as may be directed by the District Court. When the record in such a case has been filed in this court, the same proceedings shall be had as specified in Clauses two and three, or the court will take such proceedings as may to it seem advisable to bring in the proper parties.

RULE XX—*Dismissing Cases by Agreement*

Whenever the plaintiff and defendant in a writ of error pending in this court, or the appellant and appellee in an appeal, shall, by their attorneys of record, sign and file with the clerk an agreement in writing directing the case to be dismissed, and specifying the terms on which it is to be dismissed, as to costs, and shall pay to the clerk any fees that may be due to him, it shall be the duty of the clerk to enter the case dismissed, and to give to either party requesting it a copy of the agreement filed; but no mandate or other process shall issue without an order of the court.

On dismissal, no mandate to issue except by order of court.

Rule 20 is printed as Clause 7 of Rule 19 in the *Third Circuit* and as Clause 6 of Rule 18 in the *Sixth Circuit*. In the *Fourth Circuit* in addition to the Rule as it exists in the First Circuit, is added the following: "No attorney's docket

fee shall be taxed in a case dismissed under this rule.” In the *Eighth Circuit* after the word clerk in the eighth line the rule reads as follows: “Seasonably to present such agreement to the court for its consideration and determination.”

Decisions

After one motion to dismiss has been filed and set down for hearing the appellee has no right to file a second motion to dismiss without leave of the court, which leave will not be granted on formal grounds only. *Nashua & L. R. Cor. v. Boston & L. R. Cor.*, 51 *Fed. R.* 929-931, 2 *C. C. A.* 542.

If the Circuit Court had no jurisdiction, that is not ground for dismissing an appeal in the Circuit Court of Appeals, but ground for reversal of the judgment for want of jurisdiction in the court in which it was rendered. *Ib.* 930.

An appellant cannot as of right dismiss his own appeal. Ordinarily he is not entitled to an order of dismissal without prejudice if he intends at some future time to bring another appeal. *Donnallan v. Tannage Patent Co.*, 79 *Fed. R.* 385, 24 *C. C. A.* 647.

Where a cause is disposed of on appeal for some reason not touching the merits, the decree should usually show that it was without prejudice, and an appellant may sometimes show mistake or some other special reason which may entitle him to a special order. *Ib.* 386.

RULE XXI—*Motions*

First Circuit—(1) The motion-day shall be the first Tuesday of every stated session of the court, and any other Tuesday while the court shall remain in session.

(2) All motions to the court shall be reduced to writing and shall contain a brief statement of the facts and objects of the motion.

(3) All motions to dismiss writs of error or appeals (except motions to docket and dismiss under Rule 16) or to advance cases, or for a writ of certiorari, and other special motions, shall be printed, and be accompanied by printed briefs.

(4) No motion to dismiss, except on special assignment by the court, shall be heard, unless previous notice has been given to the adverse party or his counsel.

(5) Any motion, of which counsel shall have given notice to the clerk in advance, shall be entered on the clerk's list in the order in which ^{Priority of entered motions.} he receives notice thereof, and shall have priority in that order before other motions, unless otherwise specially ordered by the court.

(6) Half an hour on each side shall be allowed to the argument of a motion, and no more, ^{Half hour for argument.} without special leave of the court granted before the argument begins.

Second, Fourth, Fifth, Seventh, and Eighth Circuits—(1) All motions to the court shall be reduced to writing, and shall contain a brief statement of the facts and objects of the motion.

(2) One hour on each side (one-half hour in the *Seventh Circuit*) shall be allowed to the argument of a motion, and no more, without special leave of the court, granted before the argument begins.

(3) No motion to dismiss, except on special assignment by the court, shall be heard, unless previous notice has been given to the adverse party, or the counsel or attorney of such party.

In the *Third Circuit* this rule is numbered 22 and is the same as Clauses 1 and 2 in the *Second Circuit* as printed above.

In the *Sixth Circuit* this rule is numbered 24 and is as follows:

(1) Motions shall be filed with the clerk and shall contain a brief statement of the facts, and of the objects of the motion, and be accompanied by such affidavits as are thought proper.

(2) Counsel making the motion shall serve a copy thereof and of the accompanying papers and a notice of hearing upon the adverse counsel, and also copy of any brief or argument to be presented in support of the motion. Such notice may be for any day after four days from the service. The opposing party may, on or before the day named in the notice, or within any extension of time made by the court or a judge thereof, file counter-showing or brief, and the motion will then stand submitted, unless oral argument is directed.

Except by stipulation, no motion will be considered without acknowledgment, or proof of such notice.

(3) Upon motions, there will be no oral argument, except by leave of the courts first obtained, and in such case, the court will fix the day for hearing and the time to be allowed for argument, and the clerk will notify counsel.

In the *Ninth Circuit*¹ this rule is the same as in the Second Circuit except that the words “and shall be served upon opposing counsel at least five days before the day noticed for the hearing” are added at the end of the first section thereof. And in the 2d clause one-half hour on each side for argument is prescribed.

RULE XXII—*Call and Order of the Calendar*

First Circuit—(1) On the first Tuesday of October and of January and on the second Tuesday of April the court, except as may from time to time be otherwise ordered, will commence calling cases for argument in the order in which they stand on the calendar and proceed from day to day during the session in the same order, but no case from the District of Massachusetts shall be called before the second Tuesday of the session.

(2) Where no counsel appears and no brief has been filed for the plaintiff in error or appellant, when the case is called for trial the defendant may have the plaintiff called and the writ of error or appeal dismissed.

(3) Where the defendant fails to appear when the case is called for trial the court may proceed to hear an argument on the part of the plaintiff and to give judgment according to the right of the case.

(4) When a case is reached in the regular call of the calendar and there is no appearance for either party the case may be dismissed at the cost of the plaintiff.

¹ Motions.—When typewritten, an original and three copies should be filed.

(5) If either of the parties is ready when the case is called the same will be heard; and if neither party shall be ready the case may be dismissed, or be postponed to the next session as the court may order.

When either party ready, case heard when called.—Neither party ready, cause may be postponed or dismissed.

(6) If a case is called for hearing at two stated sessions successively, and upon the call at the second session, neither party is prepared to argue it, it will be dismissed at the cost of the plaintiff in error or appellant, unless sufficient cause is shown for further postponement.

When neither party ready upon call at two successive terms, cause dismissed.

(7) The court will not hear arguments on Mondays or Saturdays, unless for special cause it shall so order.

No arguments on Mondays or Saturdays.

(8) Five cases are liable to be called on the coming in of the court on each day.

Five cases called daily.

(9) Revenue and other cases which concern the United States and which also involve or affect some matter of general public interest, and criminal cases, and cases once adjudicated by this court on their merits and again brought up by writ of error or appeal, may be advanced by order of the court.

What causes may be advanced.

(10) Two or more cases involving the same question may, by leave of the court, be heard together, to be argued as one case or more, as the court may order.

What causes may be heard together.

(11) No agreement of counsel to pass or postpone a case, or to substitute one case for another, shall become effective except on leave.

Second, Third (where it becomes Clauses 5-2 and 4 of Rule 19) *Fifth and Seventh Circuits*—(1) Where no counsel appears, and no brief has been filed for the plaintiff in error or appellant, when the case is called for trial, the defendant may have the plaintiff called and the writ of error or appeal dismissed.

(2) Where the defendant fails to appear when the case is called for trial, the court may proceed to hear an argument on the part of the plaintiff and to give judgment according to the right of the case.

(3) When a case is reached in the regular call of the docket, and there is no appearance for either party (and no brief on file for the appellant or plaintiff in error—as printed in the 5th Circuit), the case shall be dismissed at the cost of the plaintiff.

In the *Fourth Circuit* the rule reads:

(1) When a case is called for hearing, and no counsel appears, and no brief has been filed for the plaintiff in error or appellant, the defendant in error or appellee may have the adverse party called and the writ of error or appeal dismissed.

(2) Where the defendant in error or appellee fails to appear when the case is called for hearing, the court may proceed to hear argument on the part of the plaintiff in error or appellant, and to give judgment according to the right of the case.

(3) When a case is reached in the regular call of the docket, and no counsel appears for either party, and no submission of the case is asked, the case may be dismissed at the cost of the plaintiff in error or appellant.

In the *Sixth Circuit* this rule is as follows:

(1) Upon the expiration of the time limited for filing briefs, the case shall stand for hearing when reached.

(2) A calendar, containing all cases docketed and not heard, shall be printed by the clerk for the October, January and April sessions. The cases on the calendar which stand for hearing under Clause 1 will be called for argument in their order (as far as practicable) on the calendar, except as special advancements may have been made.

(3) By leave of court and on motion of either party (1) cases entitled by statute to precedence, (2) criminal cases, (3) appeals, writs of error or petitions to revise in bankruptcy matters, and (4) cases which are for the second time in this court,—may be advanced and set for a designated session. The court may also, on its own motion or for good cause shown on motion of either party, advance any case to be heard at any session, though the time permitted under the rules for filing briefs may not have expired at the day set for hearing.

(4) Not more than three cases will be heard on one day

(counting, however, as one case, two or more which are heard together). The call for the next day shall, at the adjournment of court, be exhibited in the clerk's office. Counsel choosing to rely on the judgment of the clerk as to the probable time of hearing any case must do so at their own risk.

(5) When the case is called, if either party is ready, the case will be heard. If there is no appearance for either party, the case will be dismissed. If the appellant does not appear by counsel or by printed brief but the appellee does appear, the case will be dismissed. If the appellant appears and the appellee does not, the court will hear the appellant.

(6) By agreement of counsel in open court or by stipulation filed in the clerk's office, hearing may be continued once to any later session during the term or from the last session of one term to the first session of the next term, but not to a later day during the same session. Subsequent continuances can be made only by the court and will be only for reasons satisfactory to the court; and engagement of counsel in other courts will not be considered good cause.

(7) Two or more cases, involving the same question, may by order of the court, be heard together, but they must be argued as one cause.

In the *Eighth and Ninth Circuits* it is the same as in the Second Circuit, except that the words "in error or appellant" are added at the end of third section.

RULE XXIII—*Printing Records*

First Circuit—(1) In all cases, the plaintiff in error or appellant, on docketing a case and filing the record, shall enter into an undertaking to the clerk, with surety to his satisfaction, for the payment of his fees, or otherwise satisfy him in that behalf.

When cause docketed, security for clerk's fees to be given.

(2) The clerk shall cause an estimate to be made of the cost of printing the record, and of his fee for preparing it for the printer, and shall notify to the party docketing the case the amount of the estimate. If he shall not pay it within a reasonable time, the clerk shall notify the adverse party, and he may

Clerk to make estimate of costs of printing.

pay it. If neither party shall pay it, and for want of such payment the record shall not have been printed when the case is reached at the regular call of the docket, the case may be dismissed.

(3) Upon payment by either party of the amount estimated by the clerk, twenty-five copies of the record shall be printed under the clerk's supervision, for the use of the court and of counsel.

Twenty-five copies of record printed.

(4) The clerk shall take to the printer the original transcript on file; but shall cause copies to be made for the printer of such original papers sent up under Rule 14, or other original papers, as are necessary to be printed.

Original transcript used by printer.

(5) The clerk shall supervise the printing, and see that the printed copies are properly indexed; and he shall distribute printed copies to the judges, and the reporter, from time to time, as required, and three copies to the counsel for each party. An additional number of copies may be printed at the request of either party for his own use and at his own expense, or by order of the court.

Clerk to supervise printing and distribute the record.

(6) The parties may stipulate in writing that parts only of the record shall be printed, and the case may be heard on the parts so printed; but the court may direct the printing of other parts of the record.

On stipulation, parts of record only to be printed.

(7) The clerk may receive from either party, and use as parts of the printed record, so far as the same may be of proper and convenient size and type, any portions which have been printed in any other court, and also printed copies of patents and other exhibits, allowing the party furnishing the same such sum therefor as the clerk deems reasonable, to be added to and form a part of the cost of printing.

Printed record of other courts may be used.

(8) If the actual cost of printing the record, together with the fee of the clerk, shall be less than the amount estimated and paid, the amount of the difference shall be refunded by the clerk to the party paying it. If the actual cost and clerk's fee shall

Surplus of costs paid, refunded.

exceed the estimate, the excess shall be paid to the clerk before the delivery of a printed copy to either party or his counsel.

(9) In case of reversal, affirmance, or dismissal, with costs, the cost of printing the record and the clerk's fee shall be taxed against the party against whom costs are given, and shall be inserted in the body of the mandate or other proper process.

Costs of printing record taxed as costs.

Second Circuit—On the filing of the transcript in every case, the clerk shall forthwith cause fifteen copies of the same to be printed, and shall furnish three copies thereof to each party, at least thirty days before the argument, and shall file nine copies thereof in his office. The parties may stipulate in writing that parts only of the record shall be printed, and the case may be heard on the parts so printed; but the court may direct the printing of other parts of the record. The clerk shall be entitled to demand of the appellant, or plaintiff in error, the cost of printing the record, before ordering the same to be done. If the record shall not have been printed when the case is reached for argument, for failure of a party to advance the costs of printing, the case may be dismissed. In case of reversal, affirmance, or dismissal, with costs, the amount paid for printing the record shall be taxed against the party against whom costs are given.¹

Third Circuit—(1) It shall be the duty of the clerk, immediately after the record of any case shall have been filed with him and docketed and the deposit fee of twenty-five dollars shall have been paid, to notify counsel for all parties that he will print only the parts of the record mentioned in the second section of this rule, specifying what those parts shall be, and to notify the counsel for plaintiff in error or appellant of his estimate of the cost of printing such parts of the record and of his fee for preparing the parts for the printer, indexing the same and supervising the printing thereof. He shall print no other parts of the record unless, within ten days after such notice, he receives from some one

¹ See Clause 1, Rule 36, Second Circuit, page 347, corresponding with Clause 1, Rule 23, First Circuit.

or more of the counsel a written certificate that in his or their judgment other specified parts thereof should be printed in order to enable this court properly to decide the questions raised, in which event the parts so certified as necessary shall also be printed. The court may, in its discretion, direct the printing of other parts of the record, and, in lieu of printing patents or other exhibits, separate printed copies thereof, not less than ten in number, may be filed with the clerk. If other parts of the record than those specified in his notice shall be required to be printed by any of the counsel, or by this court, the clerk shall immediately notify the counsel for the plaintiff in error or appellant of his estimate of the additional cost of preparing, printing and indexing such other parts. The plaintiff in error or appellant shall pay to the clerk, within ten days after notice of any estimate, the amount thereof, in default of which the writ of error or appeal may be dismissed upon the motion of the opposite party, or by the court of its own motion.

(2) Unless additional parts of the record shall be required to be printed under the provisions of the first section of this rule, the clerk shall print, for the use of the court, only the following parts thereof:

In writs of error—

- (a) The docket entries.
- (b) The pleadings upon which the case was tried.
- (c) The bill of exceptions.
- (d) The motion and reasons for judgment *non obstante veredicto*, if any.
- (e) The opinion of the court below, if any.
- (f) The charge to the jury, if any.
- (g) The verdict of the jury, if any.
- (h) The judgment entered.
- (i) The assignments of error.

In appeals—

- (a) The docket entries.
- (b) The pleadings on which the case was heard and determined.
- (c) The evidence, if any, on which it was heard and determined.

(d) The report of the examiner, master, auditor, referee or other officer who first decided the case, if any.

(e) The exceptions to that report, if any.

(f) The opinion of the court, if any.

(g) The judgment or decree entered.

(h) The assignments of error.

In bankruptcy and other cases not being strictly within either of the above classes, the printed record shall conform as nearly as may be practicable to the record in appeals.

(3) The clerk shall cause twenty-five copies of the record to be printed, and three copies thereof to be furnished to the counsel of the plaintiff in error or appellant, and also three copies to each of the counsel who shall have entered appearance for any of the other parties, and the remaining copies to be filed in his office, all, if possible, within thirty days after the payment to him of the amount of his estimate made under the provisions of the first section of this rule.

(4) The clerk shall supervise the printing of the record, have it properly indexed and distribute printed copies thereof to the judges of the court from time to time as required.

(5) If the actual cost of printing the record and the clerk's fee of twenty-five cents per page for preparing the record for the printer, indexing the same, supervising the printing and distributing the copies, shall be less than the amount estimated and paid, the clerk shall refund the difference to the party paying the same, but if they shall exceed the clerk's estimate the amount of such excess shall be paid to the clerk before he shall file the printed copies of the record or deliver any of them to the parties.

(6) In case of reversal, affirmance or dismissal, with costs, the actual cost paid for printing the record by the party in whose favor costs are awarded, and the clerk's fee for supervising the printing, etc., where such fee is paid by the party in whose favor costs are awarded, shall be taxed against the party against whom costs are given and shall be inserted in the body of the mandate or other proper process.

(7) Each printed record shall show, by a note or memorandum, the time when each pleading or document was filed, and

shall contain at the tops of its pages running titles of its contents.

(8) In any case where the record, or any part thereof, has been printed in the court below, the same may be embodied in and used as the printed record of this court; *provided*, the manner and style of the printing shall correspond with the requirements of the several sections of this rule for printing done under the supervision of the clerk of this court; but the plaintiff in error or appellant shall pay to the clerk of this court, not only the deposit fee of twenty-five dollars upon filing the record and having it docketed, but also the fee prescribed by Rule 29 for preparing the record for the printer, indexing the same, supervising the printing and distributing the copies thereof.

(9) The clerk shall, on or before the conclusion of each case, collect and file for preservation in this court three copies of the printed record and of each brief, printed motion and argument submitted in such case, and shall, immediately after the mandate in any case shall have been sent down to the lower court, notify the defeated party in this court that unless he removes the remaining copies of the record and briefs within ten days after notice so to do, the same will be destroyed.

Fourth Circuit—This rule shall apply only to cases in which
Printing records by con- counsel for all parties to any cause pend-
sent. ing in this court, or about to be brought
 into this court, shall by stipulation, in writing, filed with
 the clerk of the court below, agree to be governed by the
 terms hereof.

(1) The transcript may be made and the record printed as has been heretofore the practice of this court, and the same shall, subject to the provisions of secs. 3, 6 and 7 of Rule 14, be made up by the clerk of the court below and transmitted to this court under his hand and seal as heretofore.

(2) All records in such cases shall be printed under the supervision of the clerk of this court by such printer and at such rate as this court may designate. In such cases, upon the payment of the estimated cost of printing, together with the supervising and other fees established by law (which

amount shall be deposited with the clerk within ten days after notice thereof), the clerk shall cause to be printed thirty-five copies of the record, twenty-five copies of which shall be filed for the use of the court, three copies furnished to the adverse party, and the remaining copies to be delivered to the appellant, plaintiff in error or petitioner.

(3) The parties may stipulate in writing that parts only of the transcript of the record shall be printed, and the case may be heard on the parts so printed, but the court may direct the printing of other parts of the record.

(4) If the record shall not have been printed when the case is reached on the regular call of the docket, the case may be dismissed.

(5) In case of reversal, affirmance, or dismissal, with costs, the amount paid for the printing of the record and the clerk's fees for supervising the same shall be taxed against the party against whom costs are given.

(6) In cases brought here under this Rule it shall be the duty of the plaintiff in error or appellant to docket the case and file the record thereof with the clerk of this court by or before the return-day, whether in vacation or in term time. But for good cause shown the justice or judge who signed the citation, or any judge of this court, may enlarge the time by or before its expiration, the order of enlargement to be filed with the clerk of this court. If the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the cause docketed and dismissed upon producing a certificate, from the clerk of the court wherein the judgment or decree was rendered, stating the case and certifying that such writ of error or appeal has been duly sued out or allowed. And in no case shall the plaintiff in error or appellant be entitled to docket the case and file the record after the same shall have been docketed and dismissed under this rule, unless by order of the court.

(7) But the defendant in error or appellee may, at his option, docket the case and file a copy of the record with the clerk of this court; and if the case is docketed and a copy of the record filed with the clerk of this court by the plaintiff in error or appellant within the period of time above limited and

prescribed by this rule, or by the defendant in error or appellee at any time thereafter, the case shall stand for argument at the term.

(8) Upon the filing of the transcript of a record brought up by writ of error or appeal, the appearance of the counsel for the party docketing the case shall be entered as of course.

Fifth Circuit—(1) The clerk shall, upon the docketing of a case, forthwith cause an estimate to be made of the cost of printing the record and of his fee for preparing it for the printer and supervising the printing, and shall notify the party docketing the case of the amount of the estimate. If he shall not pay it within fifteen days in ordinary cases, and within three days in preference cases, after the date of such notice, the clerk shall notify the adverse party, and he may pay it. If neither party shall pay it, and for want of such payment the record shall not have been printed when a case is reached for hearing, the case may be dismissed at the discretion of the court.

(2) The clerk shall cause the record in all cases to be printed forthwith after the payment of such estimate, and shall immediately thereafter furnish to the counsel of each party whose appearance shall have been entered, three copies of the printed record, taking a receipt therefor, and the parties may, by written stipulation filed prior to the printing of the record, agree that only parts of the record shall be printed, and the same may be heard only on the parts so printed, but the court may direct the printing of other parts of the record.

(3) The clerk shall take to the printer the original transcript on file, but shall cause copies to be made for the printer of such original papers sent up under Rule 14, or other original papers, as are necessary to be printed.

(4) The clerk shall cause at least twenty-five copies of the record to be printed, and may print a larger number on the request of either party on payment of the amount necessary for the printing of such extra copies.

Ordered, that Paragraph 5 of Rule 23, of the standing rules of this court be amended so as to read as follows:

(5) The clerk shall supervise the printing and see that

the printed record is properly indexed. There shall be omitted from the printed transcripts the following:

(i) Commissions to take testimony, and the formal captions to all depositions, and the certificates of commissioners as to the taking of the depositions, except in cases where objections have been made to the depositions on account of defects in caption or certificate.

(ii) All process in the nature of subpoenas, citations summons, and subpoenas in chancery, unless from the assignment of errors it appears that some issue is raised which makes it necessary for the court to inspect such writs, and then only such as are involved.

In every transcript wherein any pleading, exhibit, or other paper appears at more than one place, such pleading, exhibit, or other paper shall be printed at the place it first appears in said transcript, and not thereafter; but the omission shall be indicated by apt notations and references to the pages of the printed record where it appears.

The clerk shall distribute the printed copies to the judges of the court and to the reporter from time to time, as required. If the cost of printing the record, together with the clerk's fee for supervising the same, shall be less than the amount estimated and paid, the difference shall be refunded by the clerk to the party paying the same. If the actual cost and the clerk's fee shall exceed the clerk's estimate, the amount of such excess shall be paid to the clerk before he shall deliver or file the printed record or any copies thereof.

(6) In case of reversal, affirmance, or dismissal, with costs, the amount of the cost of the printing of the record and of the clerk's fee for supervising the same, shall be taxed against the party against whom costs are given, and shall be inserted in the body of the mandate or other process.

(7) The clerk shall receive from either party and use as parts of the printed record so far as the same may be of proper size and type, any portions which may have been printed in any other court, and also printed copies of patents and exhibits, allowing the party furnishing the same such

sums therefor as the clerk deems reasonable, to be added to and form a part of the cost of printing.

Sixth Circuit—The rule is numbered 19 and reads as follows:

Rule 19—*Printing Records.*

(1) In cases where the record is printed by the appellant under Act of February 13, 1911, he shall file with the clerk twenty-five printed copies thereof within the time as limited or extended for making return to writ of error or appeal. The clerk shall examine the printed records so offered to ascertain whether the transcript complies with Rule 15, and also, whether the printed records comply with the statute and are properly indexed. If, in his judgment, they are insufficient in any particular, he shall bring the matter to the attention of the court, which will thereupon make such order as to it may seem proper for corrected or supplementary return and printed records. As soon as the printed records are approved as filed or perfected as ordered, the clerk shall deliver one copy to each counsel or group of counsel representing a separate interest, and shall continue such distribution as counsel subsequently appear.

(2) The clerk shall, from time to time and as directed by the senior Circuit Judge, receive proposals for printing such records as are to be printed by the clerk, which proposals shall be submitted to such judge, who will, in his discretion, award such printing to the most satisfactory bidder; and the same shall be done, during the period of such award, by the person to whom it is made.

(3) In cases where appellant is not proceeding under such statute, the clerk shall at once, upon the docketing of the case, cause an estimate to be made of the cost of printing the record, including his supervising fee as provided in the table of costs following Rule 27, and notify counsel for appellant of the estimated amount, which shall be paid to the clerk within ten days after such notice. If not so paid, the case may be dismissed upon motion or by the court upon its own motion. Supplemental estimates and payments thereof shall be made, if necessary; any excess payment shall be refunded, when the printing is finished. When the record

was printed upon a former review of the same case, and enough old records to be reasonably sufficient for use upon the hearing are on file or available, the use of such old records, in lieu of printing, will be permitted, upon the order of the presiding judge, and to the extent specified in such order.

(4) At once, upon the payment of such estimate, the clerk shall cause twenty-five copies of the record to be printed forthwith, shall file the same and shall distribute three copies of the same to counsel for each separate adverse interest then or thereafter appearing. Before printing, he shall examine the transcript to ascertain whether it complies with Rule 15, and if, in his judgment, it omits anything required by that rule, he shall submit the matter to the court, which will make such order as to it may seem proper regarding a corrected or supplementary return; and the printing shall be delayed until the filing of any further return so ordered. In printing, the clerk shall omit any matters contained in the transcript which, by Rule 15, are required to be omitted. If the appellant shall in writing and before the record is printed, request the clerk so to do, he shall print fifty copies instead of twenty-five. If the appellee shall request such additional copies to be printed, the clerk shall comply with such request, if the appellee, upon demand, advances to him the estimated cost of printing the additional twenty-five copies. If, later, a review in the Supreme Court is sought, the clerk shall deliver such twenty-five copies to the party seeking a review; but if such additional records are wanted by the party who did not pay for the printing thereof, the clerk shall require payment to him of the actual cost of such additional printing and shall refund the same to the party who had paid therefor.

(5) Where the record is printed by the appellant, he shall file therewith proof by affidavit of the actual cost of such printing, including the amount paid to the clerk in the District Court for the transcript. The amounts paid to the clerk of the District Court for the manuscript transcript and to the clerk of this court for printing and for his fees in connection therewith, or the amounts so shown to have been paid below by appellant (not exceeding, for printing, the

amount which printing and supervision by the clerk of this court would have cost) shall form a part of the costs of the cause in this court and shall be taxed against the party against whom the costs are given and shall be inserted in the mandate or other proper process.

Seventh Circuit—(1) In all cases the plaintiff in error or appellant on docketing a case and filing the record shall enter into an undertaking to the clerk with surety to be approved by the clerk for the payment of all costs which shall be incurred in the cause, shall deposit with the clerk twenty-five dollars (\$25.00) to be applied to the payment of costs and fees, and from time to time when necessary shall, on the demand of the clerk, make further deposits for that use.

(2) The clerk, upon the docketing of a case, shall forthwith cause an estimate to be made of the cost of printing the record and of his fees for preparing it for the printer and for supervising the printing thereof, and shall at once notify the attorney for the plaintiff in error, or appellant, of the amount of such estimate, which shall be paid to the clerk within ten days after such notice. If not so paid, the writ of error or appeal may be dismissed upon the motion of the opposite party, or by the court of its own motion.

(3) The clerk shall cause the record in each case to be printed forthwith after the payment of such estimate, and shall immediately thereafter furnish to each of the respective parties at least three copies of the printed record, taking a receipt therefor. The parties may, by written stipulation filed with or prior to the filing of the record, agree that only parts of the record shall be printed, and the case will be heard on the parts so printed only, unless the court shall direct the printing of other parts.

(4) The clerk shall cause at least twenty-five copies of the record to be printed and may print a larger number on the request of either party on the payment of the amount necessary for the printing of such extra copies.

(5) The clerk shall supervise the printing and see that the printed record is indexed properly, and in a manner to indicate briefly the character of each document and ex-

hibit referred to. He shall distribute the printed copies to the judges of the court from time to time as required. If the cost of printing the record, together with the clerk's fee for supervising the same, shall be less than the amount estimated and paid, the difference shall be refunded by the clerk to the party paying the same. If the actual cost and the clerk's fee shall exceed the estimate, the amount of the excess shall be paid to the clerk before he shall deliver or file the printed record or any copies thereof.

(6) In case of reversal, affirmance, or dismissal, with costs, the amount of the cost of the printing of the record and of the clerk's fee for supervising the same shall be taxed against the party against whom costs are given and shall be inserted in the body of the mandate or other proper process.

(7) Upon the clerk's producing satisfactory evidence by affidavit, or the acknowledgment of the parties or their sureties or attorneys, of having served a copy of the bill of fees, due from them respectively in this court on such parties, their sureties or attorneys, an attachment shall issue against such parties or their sureties respectively, to compel the payment of said fees.

(8) The clerk shall adopt a uniform size for the printing of all records, and the same shall be printed in small pica type, on clear white paper, with a margin of not less than an inch and a half, and show by a note or memorandum the time when each pleading or document was filed, and the printed record shall also contain running titles of its contents.

(9) The briefs of attorneys shall also be printed and conform as nearly as practicable to the size of the printed record.

(10) The clerk shall, on or before the conclusion of each case, collect and file, or otherwise preserve together, one copy of the printed record and of each brief, printed motion and argument submitted in each case.

(11) In any case where the record shall have been printed in the court below, the presiding judge may on the application of the plaintiff in error or appellant order that such printed record may be used in place of the printing hereinbefore provided for. But the clerk shall prepare and cause

to be printed and attached to the printed record an index thereof, and shall be paid the same fees for the indexing and supervising of such printed record as if printed under his supervision.

(12) The clerk of this court shall obtain sealed proposals for the printing hereinbefore provided for, which proposals shall be submitted to the senior circuit judge of the court, who shall award such printing to the lowest and best bidder, and all such printing shall be done by the person to whom the same is so awarded, except in emergencies, when printing may be done by another at the same or less price and when a case shall be heard upon the record printed below, the costs for printing shall be taxed on the basis of actual cost not exceeding the rate of the accepted bid.

(13) The fees of the clerk of this court, as prescribed by order of the Supreme Court, made February 28, 1898, are as follows: ¹

Eighth Circuit—(1) In cases brought to this court in which the plaintiff in error or appellant elects to waive the printing of the record under the provisions of the Act of Congress, entitled "An act to diminish the expense of proceedings on appeal and writ of error or of certiorari" approved February 13, 1911, and file a typewritten or manuscript transcript of the record in this court such plaintiff in error or appellant may, within twenty days after the allowance of any writ of error or appeal, serve on the adverse party a copy of a statement of the parts of the record which he thinks necessary for the consideration of the errors assigned, and file the same, with proof of service thereof, with the clerk of this court; the adverse party, within twenty days thereafter, may designate in writing and file with the clerk additional parts of the record which he thinks material, and, if he shall not do so, he shall be held to have consented to a hearing on the parts designated by the plaintiff in error or appellant. If parts of the record shall be so designated by one or both of the parties, the clerk shall print those parts only; and the court will consider nothing but those parts of the record in determining the questions raised by the errors assigned. If

¹ Here follows the table of fees printed under Rule 31, pages 333-334.

at the hearing it shall appear that any material part of the record has not been printed, the writ of error or appeal may be dismissed, or such other order made as the circumstances may appear to the court to require. If the defendant in error or appellee shall have caused unnecessary parts of the record to be printed, such order as to costs may be made as the court shall think proper.

(2) On the filing of the transcript in every case the clerk shall cause the same, or the parts thereof designated under this rule, to be printed, and shall furnish three copies of the record so printed to each party at least sixty days before the argument.

(3) In cases brought to this court in which the record has been printed and used upon the hearing in the court below, and which substantially conform to the printed records in this court, the plaintiff in error or appellant upon application to and by leave of this court, may furnish to the clerk twenty-five copies of such record, used on the hearing in the court below, to be used in the preparation of the printed record in this court; and the clerk's fee for preparing the record for the printer, indexing same, supervising the printing and distributing the copies, shall be computed as if said record so furnished had been printed under his supervision.

(4) The clerk shall be entitled to demand of the appellant or plaintiff in error the cost of printing the record before ordering the same to be done.

(5) If the record shall not have been printed when the case is reached for argument, for failure of the party to advance the costs of printing, the case may be dismissed.

(6) In case of reversal, affirmance, or dismissal, with costs, the amount paid for printing the record shall be taxed against the party against whom costs are given.

(7) In any case brought to this court in which the record has been printed, in which a certiorari shall be granted, under the provision of Rule 18 of this court, the return to such writ of certiorari shall be printed in the same manner as the record was.

(8) If in any cause in which the record or a portion thereof has been printed it shall be made to appear to this court that the printed transcript does not substantially conform to the requirements of the rules of this court, it may be rejected and stricken from the files and such order relative thereto may be entered as the court shall deem proper.

Ninth Circuit—(1) All records shall be printed under the supervision of the clerk, and upon the docketing of a cause he shall cause an estimate to be made of the expense of printing the record, and his fee for preparing it for the printer and supervising the printing, and shall notify the party docketing the case of the amount of the estimate. If the amount so estimated is not promptly paid over to the clerk, and for want of such payment the record shall not have been printed when a case is reached for argument, the case shall be dismissed.

(2) Upon payment of the amount estimated by the clerk, thirty copies of the record shall be printed under his supervision for the use of the court and of counsel.

(3) In cases of appellate jurisdiction the original transcript on file shall be taken by the clerk to the printer. But the clerk shall cause copies to be made for the printer of such original papers sent up under Rule 14, sec. 4, as are necessary to be printed; and the whole of the record in cases of original jurisdiction.

(4) In all cases, including cases in which the record may have been printed under the Act of Congress, approved February 13, 1911, or otherwise, the clerk of this court shall index the printed record, and distribute the printed copies to the judges and the reporter, and one or more printed copies to the counsel for the respective parties.

(5) If the expense of printing and supervision shall be less than the amount estimated and paid, the clerk shall refund the difference to the party paying same. If the expense is greater than the estimate the amount of such excess shall be paid to the clerk before he shall file the printed record or deliver copies to the parties or their counsel.

(6) In case of reversal, affirmance, or dismissal, with costs, the amount paid for printing the record and of the

clerk's fee shall be taxed against the party against whom costs are given.

(7) The plaintiff in error or appellant may, upon filing the record in this court, file with the clerk a statement of the errors on which he intends to rely, and of the parts of the record which he thinks necessary for the consideration thereof, and forthwith serve on the adverse party a copy of such statement. The adverse party within ten days thereafter may designate in writing, filed with the clerk, additional parts of the record which he thinks material; and, if he shall not do so, he shall be held to have consented to a hearing on the parts designated by the plaintiff in error or appellant. If parts of the record shall be so designated by one or both of the parties, or if such parts be distinctly designated by stipulation of counsel for the respective parties, the clerk shall print those parts only; and the court will consider nothing but those parts of the record, and the errors so stated. If at the hearing it shall appear that any material part of the record has not been printed, the writ of error or appeal may be dismissed, or such other order made as the circumstances may appear to the court to require. If the defendant in error or appellee shall have caused unnecessary parts of the record to be printed, such order as to costs may be made as the court shall think proper.

All statements and stipulations filed hereunder shall distinctly and accurately refer to the pages of the original certified record, as well as the documents to be printed or omitted.

(8) At the time of filing the record and docketing the cause, counsel for the plaintiff in error or appellant in patent cases may furnish the clerk with copies of patent office drawings and specifications to be used as inserts, and the same, if in proper form and of convenient size, shall be used in printing the record.

(9) In all cases, including cases in which the record may have been printed under the Act of Congress approved February 13, 1911, or otherwise, the fee of the clerk of this court for performing the services herein required shall be

twenty-five cents for each printed page of the record and index, as provided by law.

Decisions

Where the record is before the appellate court it has power to allow parts only to be printed. It has no power to allow a record used on a former appeal to be used in a second appeal. *Merriman v. Chicago, D. & V. R. Co.*, 120 *Fed. R.* 240-242, 56 *C. C. A.* 536.

The remedy for a defective record is by certiorari for a diminution of the record and not by motion to dismiss the appeal. *Ib.* 242.

The Act of July 20, 1892, giving the right to sue *in forma pauperis*, is limited to courts of original jurisdiction. *Bradford v. Southern Ry. Co.*, 195 *U. S.* 243, 49 *L. ed.* 178.

Case of *Reed v. Pennsylvania Ry. Co.*, 111 *Fed. R.* 714, 49 *C. C. A.* 572, overruled, and Rule 16 of the Sixth Circuit modified to conform to the decision of the Supreme Court above. *In re Bradford's Petition*, 139 *Fed. R.* 518, 71 *C. C. A.* 334.

In view of the limitations which Congress has thrown around the privilege of suing *in forma pauperis*, by confining the right to so sue to courts of original jurisdiction, Rule 23 should be enforced in all cases. *Ib.* 519.

The application of the coercive powers of the court to enforce compliance with its rules does not necessarily require that the dismissal of a case, without regard to the merits of the controversy shall be the penalty for an infraction of rules. On the other hand, the court will not grant indulgence to an appellant merely for his convenience, when not necessary to serve the ends of justice. *Matsumura v. Higgins*, 187 *Fed. R.* 601, 109 *C. C. A.* 431.

RULE XXIV—Briefs

First Circuit—(1) The counsel for the plaintiff in error or appellant, shall file with the clerk of this court, at least six days before the case is called for argument, twenty copies of a printed brief, one of which shall, on application, be furnished to each of the counsel engaged upon the opposite side.

Plaintiff's counsel to file 20 copies of brief six days before case called.
Contents and arrangement of brief for plaintiff.

(2) This brief shall contain, in order here stated,—

(i) A concise abstract, or statement of the case, pre-

sentencing succinctly the questions involved, in the manner in which they are raised.

(ii) A specification of the errors relied upon, which, in cases brought up by writ of error, shall set out separately and particularly each error asserted and intended to be urged; and, in cases brought up by appeal, the specification shall state, as particularly as may be, in what the decree is alleged to be erroneous. When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the specification shall set out the part referred to *totidem verbis*, whether it be in instructions given or in instructions refused. When the error alleged is to a ruling upon the report of a master, the specification shall state the exception to the report and the action of the court upon it.

(iii) A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record and the authorities relied upon in support of each point. When a statute of a State is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length.

(3) The counsel for a defendant in error or an appellee shall file with the clerk twenty printed copies of his brief at least three days before the case is called for hearing.

Defendant's counsel to file 20 copies of brief three days before case called.

His brief shall be of a like character with that required of the plaintiff in error or appellant, except that no specification of errors shall be required, and no statement of the case, unless that presented by the plaintiff in error or appellant, is controverted.

(4) When there is no assignment of errors, as required by sec. 997, *Rev. Stats. (U. S. Comp. Stats. 1901, p. 712)*, counsel will not be heard, except at the request of the court; and errors not specified according to this rule will be disregarded; but the court, at its option, may notice a plain error not assigned or specified.¹

No assignment of errors, or not specified.

¹ See Rule 11, page 239.

(5) When according to this rule, a plaintiff in error or Plaintiff in default; cause dismissed.—Defendant in default, not heard. an appellant is in default, the case may be dismissed on motion; and when a defendant in error or an appellee is in default, he will not be heard, except on consent of his adversary, and by request of the court.

(6) When no counsel appears for one of the parties, and When but one counsel heard. no printed brief or argument is filed, only one counsel will be heard for the adverse party; but, if a printed brief or argument is filed, the adverse party will be entitled to be heard by two counsel.

In the *Second Circuit* this rule is the same, except sec. 1 thereof reads as follows:

“(1) The counsel for the plaintiff in error or appellant shall file with the clerk of this court, at least twenty days before the case is called for argument, ten copies of a printed brief, one of which shall, on application, be furnished to each of the counsel engaged upon the opposite side.”

And sec. 3 reads as follows:

“(3) The counsel for a defendant in error, or an appellee, shall file with the clerk, at least ten days before the case is called for hearing, ten copies of his printed brief, one of which shall, on application, be furnished to each of the counsel on the opposite side. His brief shall be of a like character with that required of the plaintiff in error, or appellant, except that no specification of errors shall be required, and no statement of the case, unless that presented by the plaintiff in error, or appellant, is controverted.”

In the *Third Circuit* Rule 24 reads as follows:

(1) In each case in which the printed record has been delivered by the clerk to the counsel for the plaintiff in error or appellant sixty or more days before the first day of the term, such counsel shall file twenty copies of his brief with the clerk not less than thirty days before the first day of such term; in each case in which the printed record has been delivered by the clerk to such counsel between thirty and sixty days before the first day of the term, twenty copies of such brief shall be filed with the clerk not less than twenty days before the first day of such term: and in all other cases

twenty copies of such brief shall be filed with the clerk not less than fifteen days after the receipt of such printed record. Within the same time such counsel shall give to counsel for the defendant in error or appellee not less than five copies of such brief.

(2) This brief shall contain, in the order here stated (a) the names of the parties and the nature of the proceedings. (b) A short abstract of the bill or declaration or petition and of the plea or answer. (c) A statement of the question or questions involved, which shall be in the briefest and most general terms, without names, dates, amounts, or particulars of any kind whatever. (d) A concise abstract or statement of the case. (e) The assignments of error relied on, and, where any assignment of error is based on any bill of exceptions or any part of a bill of exceptions, a reference to the particular page of the record where the exception may be found. (f) Argument on the part of the plaintiff in error or appellant, which shall exhibit a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record and the authorities relied upon in support of each point. When a statute of a State is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length.

Clauses 3, 4 and 5 of the rule are substantially similar to Clauses 3, 5 and 6 of the rule in the First Circuit except that the briefs of defendant in error or appellee must be filed five days before the case is called and five copies thereof given to counsel for the plaintiff in error or appellant within that time.

In the *Fourth Circuit* the rule is the same as in the First as above given, except that the copies of plaintiff's brief must be filed, at least fifteen days before any term or adjourned term, and defendant's brief must be filed at least five days before the term or adjourned term, and either party may file 20 copies of a reply brief at least three days before the case is reached on the argument docket.

In the *Fifth Circuit* the rule is as in the First, except as to the first and third sections, which are as follows:

(1) The counsel for the plaintiff in error, appellant or petitioner, shall file with the clerk of this court at least

fifteen days in ordinary cases, and five days in preference cases, before the case is called for argument, twenty copies of a printed brief, one to be signed in handwriting by an attorney of this court, who has entered an appearance in the case; one copy of the brief shall, on application, be furnished to each of the counsel engaged upon the opposite side.

(3) The counsel for defendant in error, appellee or respondent shall file with the clerk of this court, at least five days before the case is called for argument in ordinary cases and before the case is called for argument in preference cases, twenty copies of a printed brief. His brief shall be of a like character with that required of the plaintiff in error, appellant or petitioner, except that no specification of errors shall be required and no statement of the case, unless that presented by the plaintiff in error, appellant or petitioner is controverted.

In the *Sixth Circuit*, the rule is numbered 20 and reads as follows:

(1) The counsel for appellant shall file with the clerk within twenty-five days after the filing of the printed copies of the record, twenty printed copies of a brief.

(2) This brief shall contain, in order here stated:

(i) A concise abstract, or statement of the case, presenting succinctly the questions involved, in the manner in which they are raised.

(ii) A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record and the authorities relied upon in support of each point. When a statute of a State is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length.

(3) Within 30 days after service of appellant's brief the counsel for appellee shall file with the clerk twenty printed copies of his brief, which shall be of like character to that required of appellant, except that no statement of the case shall be required.

(4) Subsequent briefs may be filed by either party; by the appellant, not less than twenty days, and by the appellee, not less than ten days, before the case is put on call for

argument. Later briefs will not be received by the clerk or by the court, without permission of the court or one of the judges thereof.

(5) Every brief of more than twenty pages shall contain, on its front fly leaves, a subject index with page references, the subject index to be supplemented by a list of all cases referred to, alphabetically arranged, together with references to the pages of the brief where the cases are cited.

(6) At or before the time of filing any brief, two copies thereof shall be served upon each adverse counsel who has appeared in this court, and if there has been no appearance here for appellee, then upon his counsel in the court below; and the clerk shall require proof or acknowledgment of such service to be filed with the briefs.

(7) When an appellant is in default under Clause 1 of this rule, the case may be dismissed on motion, or further time may be granted; when an appellee is in default under Clause 3 of this rule, the appellant may bring such default to the attention of the court by motion for a summary judgment of reversal, and thereupon the court will entertain such motion, or grant further time, as may seem proper; at the hearing, a party who has not filed a brief as required by this rule, will not be heard orally, unless the court shall so request.

In the *Seventh Circuit* the rule is the same as in the First as above given, except that the briefs are required to be filed by the first section thereof within twenty days after the date of the delivery by the clerk of the printed record. And sec. 2 requires the contents of the brief to be entitled, under the respective titles, "Statement of the case;" "Errors relied upon;" and "Brief of the argument;" and secs. 3 and 4 read as follows:

(3) The counsel for the defendant in error or the appellee shall file with the clerk twenty printed copies of his brief within twenty days after the filing of the brief of the plaintiff in error or appellant. His brief shall conform to the requirements of this rule, except that no specification of errors shall be required, and no statement of the case, unless that presented by the plaintiff in error or appellant is controverted. Either party, at or before the argument of the

cause, may file a supplemental brief strictly confined to matter in reply to the brief of the opposite party.

(4) When there is no assignment of errors, as required by sec. 997, *Rev. Stats.*, counsel will not be heard, except at the request of the court, and errors not specified according to this rule, and Rule 11, *ante*, will be disregarded; but the court at its option may notice a plain error involving the merits of the case, though not assigned or specified, and though the question be not saved according to the strict rules of practice, if it be apparent of record that the point was contested and not waived in the court below.

In the *Eighth Circuit* the rule is the same as in the First, except that in the first section the words forty days are used instead of six days and sec. 2 requires the brief to be printed on unglazed paper and in substantial conformity as to size and type prescribed by Rule 26 for the printing of records, and sec. 3 reads as follows:

(3) The counsel for a defendant in error or an appellee shall file with the clerk twenty copies of his printed brief, on unglazed paper and in substantial conformity with the size and type prescribed by Rule 26 for the printing of records at least ten days before the case is called for hearing. His brief shall be of a like character with that required of the plaintiff in error or appellant, except that no specification of errors shall be required, and no statement of the case, unless that presented by the plaintiff in error or appellant, is controverted.

In the *Ninth Circuit* the rule is the same as that in the First, except that the first section reads as follows:

“(1) The counsel for the plaintiff in error or appellant shall file with the clerk of this court, twenty copies of a printed brief, and serve upon counsel for the defendant in error or the appellee one copy thereof, at least ten days before the case is called for argument.”

The third section reads as follows:

“(3) The counsel for a defendant in error or an appellee shall file with the clerk twenty printed copies of his brief and serve upon counsel for plaintiff in error or appellant, one copy thereof, at least three days before the case is called

for hearing. His brief shall be of a like character with that required of the plaintiff in error or appellant, except that no specification of error shall be required, and no statement of the case, unless that presented by the plaintiff in error or appellant is controverted."

NOTE. Ninth Circuit—Briefs, signed by counsel who are not members of the bar of that court or fully qualified under the provisions of Rule 7, will not be considered by the court. See, also, subdivision 2 of Rule 26, page 323.

Decisions

The court will not consider alleged errors in the admission or refusal of evidence unless the testimony that is claimed to have been erroneously admitted or excluded is set out substantially in the assignment of errors and in the brief. *Haldane v. United States*, 69 *Fed. R.* 819-821, 16 *C. C. A.* 447.

Rule 24 requires the plaintiff in error to refer in his brief to the pages of the record where the testimony admitted or rejected, and the rulings of the court upon it, may be found. *Sipes v. Seymour*, 76 *Fed. R.* 116-118, 22 *C. C. A.* 90.

Rule 24 is a copy of Rule 21 of the Supreme Court. By its strict observance attention is directed to the vital questions at issue to the exclusion of immaterial questions. The court should enforce the rule requiring errors to be distinctly specified, which are intended to be urged, and errors not specified will be disregarded. *City of Lincoln v. Sun Vapor S. L. Co.*, 59 *Fed. R.* 756-759, 8 *C. C. A.* 253.

With each specification in the brief there ought to be a reference to the corresponding assignment of error as well as to the place in the bill of exceptions or other part of the record where the alleged error is shown. *Vider v. O'Brien*, 62 *Fed. R.* 326-327, 10 *C. C. A.* 385.

Failure of counsel for the plaintiff in error to allude, either in his brief or oral argument, to any of his assignments of error, will be taken to be a waiver of such error. The court cannot be expected to examine the assignments of error and itself find the reasons for the reversal. *American Fiber C. C. Co. v. Buckskin Fiber Co.*, 72 *Fed. R.* 508-511, 17 *C. C. A.* 662.

Where it is stated in the brief of plaintiff in error that the cause is presented "on the specification of errors hereinafter set forth and discussed," and one of the specifications of error is not therein referred to, it will be deemed to be waived. *Branch v. Texas Lumber Mfg. Co.*, 53 *Fed. R.* 849-850, 4 *C. C. A.* 52.

Where specifications of error are quoted in the brief, but are not supported by argument or citation to enable the court to apprehend the questions intended to be presented, they must be regarded as waived. *Pickham v. Wheeler-Bliss Mfg. Co.*, 77 *Fed. R.* 663-664, 23 *C. C. A.* 391.

Where such omitted specifications are referred to in oral argument it cannot be held as a matter of right that they should be considered, where by reason of the failure to argue them in the brief, the other party was entitled to consider them as waived. *Ib.* 664.

Where an examination of 19 different specifications of error fails to present the point that two items were submitted to the jury without pleading, the appellate court will decline to search out the place in a voluminous record where the objection on this ground was made and an exception was taken to the decision overruling it, although a fatal error be claimed to have been committed in the trial court.

Where counsel for plaintiff in error considers a point they urge too trivial to warrant them in finding and citing the specific place in the record where it was presented and preserved by exception, the court will not deem it of sufficient importance to require it to search that place out. *Northwestern, etc., Co. v. Great Lakes E. Wks.*, 181 *Fed. R.* 38, 104 *C. C. A.* 52-58.

The reference to the pages of the record required where rulings on the trial are challenged are to the pages where the rulings made and the exceptions taken are recorded, as well as those where the assignments of error are recorded. *Snipes v. Seymour*, 76 *Fed. R.* 118, 22 *C. C. A.* 90.

Clause 5 of Rule 24 provides that a case may be dismissed on motion for failure to file an assignment of errors and is applicable to all cases of appeals in equity and in admiralty as well as in writs of error in cases at law. *Dufour v. Lang*, 54 *Fed. R.* 913, 917, 4 *C. C. A.* 663.

In the *Ninth Circuit* held that a deposit in post-office at San Francisco of a copy of appellant's brief addressed to counsel in Seattle, Wash., with postage prepaid on October 1st, in a case set for argument October 11th is compliance with the rule as to service on appellee of the brief. *Russo-Chinese Bank v. Natl. Bk. of Commerce*, 187 *Fed. R.* 80, 100 *C. C. A.* 403.

Where the brief is irrelevant and grossly scandalous, containing denunciation of the judge whose opinion was excepted to, wholly unprofessional, it will be stricken out on motion, and the name of counsel filing the brief may be stricken from the record and appellant allowed to file a new brief by some other counsel. *Kelly v. Boettcher*, 82 *Fed. R.* 794-796, 27 *C. C. A.* 177.

RULE XXV—*Oral Arguments*

In the *First, Third and Fourth Circuits* the rule is as follows:

(1) The plaintiff in error or appellant in this court shall be 'entitled to open and conclude the argument of the case. But when there ^{Plaintiff to open and conclude argument.} are cross-appeals they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument.

(2) Only two counsel will be heard for each party on the argument of a case. ^{Only two counsel for each party heard.}

(3) Two hours on each side will be allowed for the argument, and no more, without special ^{Two hours allotted to each side.} leave of the court, granted before the argument begins. The time thus allowed may be apportioned between the counsel on the same side at their discretion: *Provided, always*, that a fair opening of the case shall be made by the party having the opening and closing arguments.

In the *Second Circuit* the third section has been amended to read as follows:

(3) Upon writs of error, appeals in admiralty, appeals from orders granting a preliminary injunction, and in appeals in customs cases, one hour on each side, and in other cases one hour and a half will be allowed. But in all cases where there are no difficult questions of law and the amount involved does not exceed \$500, and in appeals and petitions for review in bankruptcy, only one-half hour on each side will be allowed. No more time than above specified will be allowed without special leave of the court granted before the argument begins. The time thus allowed may be apportioned between the counsel on the same side at their discretion: *Provided, always*, that a fair opening of the case shall be made by the party having the opening and closing arguments.

In the *Fifth Circuit* the third section is as follows:

(3) One hour will be allowed for the plaintiff in error or appellant to open and present his case, and one hour will be allowed to the defendant in error or appellee to answer;

thirty minutes will then be allowed to the plaintiff in error or appellant to reply. No more time will be allowed for argument without special leave of the court.

In the *Sixth Circuit* the rule is numbered 23 and reads as follows:

(1) Cases will not be taken upon briefs, without oral argument, except by permission of the court on special application made before the case is reached.

(2) The appellant shall be entitled to open and to conclude. Cross-appeals or cross-writs of error shall be argued together as one case, and the plaintiff below shall be considered as appellant under this rule.

(3) Two counsel, and no more (unless by special permission), may be heard for each party; but where no brief is filed and no counsel is heard for one party, only one counsel will be heard for the adverse party.

(4) One hour and one-half on each side will be allowed for argument, and no more, unless by leave of the court granted before the argument begins. The time thus allowed may be apportioned between the counsel on the same side at their discretion, provided that a fair opening of the case is made by the appellant.

In the *Seventh Circuit* the rule is as in the First Circuit and a fourth section is added as follows:

(4) Reading at length from briefs or reported cases shall not be indulged.

In the *Eighth Circuit* the time allowed for argument is one hour and fifteen minutes on each side.

In the *Ninth Circuit* the rule is as in the First Circuit, except that the third section commences with the words "one hour" instead of "two hours."

RULE XXVI—*Form of Printed Records, Arguments, and Briefs*

First Circuit—All records, arguments, and briefs, printed for the use of the court, must be in such form and size that they can be conveniently bound together so as to make an ordinary octavo volume.

Second Circuit—All arguments and briefs printed for the use of the court must be printed upon a page eleven inches long by seven inches wide and must have a margin of at least two inches in width.

In the *Third Circuit*, there is no rule corresponding with Rule 26 as adopted in the other circuits but Rule 26 is as follows: "All written opinions delivered by the Court shall be filed by the Clerk."

Fourth Circuit—All transcripts of record, addenda thereto, arguments, and briefs, printed for the use of this court, shall be in small pica type, 24 pica "ems" to a line, with an index and a suitable cover containing the title of the court and the cause, the court from which the case is brought into this court, and the number of the case. Size of pages to be nine and a quarter by six and a quarter inches, except that in patent cases the size of the pages shall be ten and three-quarters by seven and five-eighths inches; that is to say, large enough to bind in copies of Patent Office drawings and specifications without folding. So much of the record as was printed in the court below may be used in this court if they conform to this rule.

In the *Fifth Circuit*, the rule is as in the First Circuit, to which is added the following: "And as well as all quotations contained therein and the covers thereof must be printed in clear print never smaller than small pica and on unglazed paper."

Sixth Circuit, the rule is numbered 21 and reads as follows: (1) Records printed by the clerk shall be of a uniform size, printed in small pica type, 24 pica ems to a line, 48 lines to a page, solid, with index and suitable cover, containing the title of the court and cause, the court from which the case is brought to this court and the number of the case; size of pages to be $9\frac{1}{2}$ by $6\frac{1}{2}$ inches, except that in patent cases, the size of the page will be $10\frac{3}{4}$ by $7\frac{5}{8}$ inches—that is to say, large enough to bind in copies of Patent Office drawings and specifications without folding.

The type shall be of a clear, strong face, substantially equivalent to that in which this rule is printed, and the paper shall be wholly unglazed. Each page shall carry, as a running

head, in addition to the 48 lines, the name of the paper or of the witness testifying, as found on that page. Each pleading, order, exhibit or other paper shall be separated from the preceding matter by a two-inch space, and shall be headed by its title, in black-face capitals, and its filing date (*e. g.*, "ANSWER—Filed February 15, 1913"). The full title of the court and cause below shall be given on the title page; elsewhere, both shall be omitted.

(2) Printed arguments and briefs of attorneys shall conform, as far as practicable, to the size and style of the printed record, but shall contain about 36 lines to the page, and be leaded with at least two-point leads.

In the *Seventh Circuit* there is no rule corresponding with Rule 26, as adopted in the other circuits, but Rule 26 is as follows:

Opinions of the Court—(1) All opinions delivered by the court shall, immediately upon the delivery thereof, be handed to the clerk to be recorded.

(2) The original opinions of the court shall be filed with the clerk of this court for preservation.

(3) Opinions printed under the supervision of the judge delivering the same need not be copied by the clerk into a book of records, but, at the end of each term, the clerk shall cause such printed opinions to be bound in a substantial manner into one or more volumes, and when so bound they shall be deemed to have been recorded within the meaning of this rule.

Eighth Circuit—(1) All transcripts of record, arguments and briefs for the use of this court, except in patent causes as hereinafter provided, shall be printed on unglazed paper not less than 6¼ inches in width by 9½ inches in length, including a sufficient margin so that they can be conveniently trimmed and bound in volumes. The paper should equal a weight of 80 pounds per ream on basis of size of sheet 25 by 38 inches.

(2) All records and briefs in patent causes may be printed on unglazed paper, of the weight as provided in section one of this rule, of such size that copies of letters patent may be inserted therein without folding, but the size of such records

and briefs in patent causes shall not be less than 7½ inches wide and 9½ inches long so that the records and briefs can be conveniently trimmed and bound in volumes.

(3) All records, briefs, supplemental transcripts and returns to writs of certiorari shall be printed in clear eleven point or small pica type (never smaller than ten point), of 26 pica or 28 small pica ems to a line and 52 lines, including running head, solid, per printed page, containing substantially, 1400 small pica ems. Where testimony or depositions by question and answer are printed the answer shall follow on same line as the question whenever the same can be done.

(4) All indexes to records and tabular exhibits, which from their nature require smaller type, may be printed in eight point or brevier type.

(5) All covers for records shall be printed in a neat and workmanlike manner on substantial paper equal to a weight of 96 pounds per ream on the basis of a sheet 25 by 40 inches, and shall contain in conspicuous type the following matter, viz:

First. TRANSCRIPT OF RECORD.

Second.

UNITED STATES CIRCUIT COURT OF APPEALS
EIGHTH CIRCUIT.

Third. The abbreviation for number "No." followed by a blank line ¾ of an inch in length.

Fourth. The title of the cause as it will be docketed in this court, viz:

....., Appellant (or Plaintiff in Error) as the case may be, vs....., Appellee (or Defendant in Error).

Fifth. The words "In Error to" (or "Appeal from") as the nature of the case may require, followed by the correct title of the trial court.

(6) Unless otherwise expressly directed by counsel, the full titles of the court and cause once correctly shown in the printed transcript shall not be repeated when unchanged. There shall be placed at the head of each subsequent pleading, etc., a brief designation of its character.

Unless otherwise expressly directed by counsel, the indorsements on pleadings, etc., shall not be printed in full; it shall be sufficient to print: "Filed in the Court on,," giving the correct date and name of the court.

The date of all orders and decrees and the name of the judge or judges making them shall always appear.

In printed transcripts the pleadings, orders, testimony of witnesses, etc., shall be separated by a face rule three inches long. The clerk shall indicate to the printer the appropriate places therefor.

When inserts are folded several times to conform to the size of the printed record, stubs should be inserted at the binding side of the record to equalize the space occupied by the folds. Unmounted photographs should be used when copies of such are required in printed records.

As this rule is intended primarily for the guidance of the printer his attention should be directed thereto before the record or brief is printed.

A sample copy of a printed record will be furnished by the clerk of this court on application therefor.

Records and briefs not printed in substantial conformity with the provisions of this Rule will not be accepted or filed.

Ninth Circuit—(1) All records printed for the use of the court must be printed on unruled white writing paper, nine and a quarter inches long and six and a quarter inches wide. The printed page, exclusive of any marginal note, reference, or running head, must be seven inches long and four inches wide, excepting in patent cases where counsel furnish to the clerk at the time of docketing the cause, patent office drawings and specifications for insertion. In such cases the margin of the record may be sufficiently enlarged to accommodate such drawings and specifications. The record must be properly indexed. Pica double-ledged is the only mode of composition allowed.

(2) All arguments, briefs, and petitions for rehearing, printed for the use of the court, must be printed on unruled

white writing paper, nine and a quarter inches long and six and a quarter inches wide. The printed page, exclusive of any marginal note, reference, or running head, must be seven inches long and four inches wide. Pica double-leaded is the only mode of composition allowed.

RULE XXVII—*Copies of Records and Briefs*

First, Second, Fifth, Eighth, and Ninth Circuits—The clerk shall carefully preserve in his office one copy of the printed record in every case submitted to the court for its consideration, and of all printed motions, briefs, and arguments filed therein.

In the *Fourth Circuit* the rule reads:

The clerk shall cause to be bound two copies of the printed record in every case, and of all printed motions, briefs, and arguments filed therein; one copy to be carefully preserved in his office, and one copy for the use of the court library, the cost of the same to be paid by the clerk out of the revenues of his office.

In the *Third, Sixth and Seventh Circuits* there is no rule corresponding with Rule 27 as adopted in the other circuits, but Rule 27 in those circuits relates to rehearing, and in the *Sixth Circuit* to costs.

RULE XXVIII—*Opinions of the Court*

First, Second, Fifth, and Eighth Circuits—(1) All opinions delivered by the court shall, immediately upon the delivery thereof, be handed to the clerk to be recorded. Opinions to be recorded.

(2) The original opinions of the court shall be filed with the clerk of this court for preservation. Original opinions preserved.

(3) Opinions printed under the supervision of the judge delivering the same need not be copied by the clerk into a book of records; When opinions need not be copied. but at the end of each term the clerk shall cause such printed opinions to be bound in a substantial manner into one or

more volumes, and when so bound they shall be deemed to have been recorded within the meaning of this rule.

In the *Third Circuit* this rule is numbered 26 and is as follows:

“(1) All written opinions delivered by the court shall be filed by the clerk.” The second and third sections are omitted.

Fourth Circuit—(1) All opinions delivered by the court shall be printed under the supervision of the judge delivering the same, or of one of the circuit judges, the cost of such printing to be paid by the clerk out of the revenues of his office and charged to the litigants in the respective cases, to be taxed and allowed as other costs.

(2) The original opinions of the court shall be filed with the clerk of this court for preservation.

(3) The clerk of this court shall from time to time cause two sets of the printed opinions of this court to be bound in a substantial manner into volumes, one set to be kept in the clerk’s office and one set to be kept in the court library.

Sixth Circuit—(1) All opinions delivered by the court shall, immediately upon the delivery thereof, be handed to the clerk to be recorded.

(2) The clerk shall cause to be printed any manuscript opinion filed with him. An opinion printed under the supervision of the clerk or of a judge need not be copied into a book of records; but at the end of each term, the clerk shall cause such printed opinions to be bound in a substantial manner into one or more volumes, and when so bound, they shall be deemed to have been recorded within the meaning of this rule.

Seventh Circuit—This rule is numbered 26 and Rule 28 is identical with Rule 30, *post*.

Ninth Circuit—The original opinions of the court shall be filed with the clerk of this court for preservation, and when so filed the same shall be deemed to have been recorded within the meaning of this rule.

RULE XXIX—*Rehearing*

First Circuit—A petition for a rehearing after judgment may be filed at the term at which the judgment is entered, and within one calendar month after such entry, and not later unless by leave granted during the term. It must be in print in the form and style required by Rule 26, and it must briefly and distinctly state its grounds, and be supported by a certificate of counsel. It will not be granted or permitted to be argued, unless a judge who concurred in the judgment desires it, and a majority of the court so determines: *Provided*, whenever a judgment is entered within less than a month before the term adjourns, the petition may be filed within a month after the entry of judgment, and with the same effect after the term as though filed before the adjournment.

Rehearing must be asked at same term, and within one month.

Petition must be printed and have certificate of counsel.

Petition, where judgment entered before expiration of one month.

Second Circuit—The petition for rehearing after judgment can be presented only at the term at which the judgment is entered unless by special leave granted during the term and must be printed and briefly and distinctly state its grounds and be supported by certificate of counsel; and will not be granted or permitted to be argued unless a judge who concurred in the judgment desires it and a majority of the court so determines.

In the *Third Circuit* the rule is numbered 27 and reads as follows:

(1) A petition for rehearing a cause may be filed with the clerk at any time within thirty days after the entry therein of the final judgment or final decree of this court, and, if the term within which such judgment or decree shall have been entered shall expire during said period of thirty days, the judgment or decree, and the record on which the same shall have been entered, shall nevertheless remain subject to the control of this court until the full expiration of the time herein allowed for the filing of the petition; provided, however, that no such petition shall be filed after this court, by any order made within said period of thirty days, shall have directed

the immediate issue of a mandate or other process in the nature of a procedendo (see Rule 30). The petition shall be printed, shall briefly and distinctly state the reasons for a rehearing, and shall be supported by the certificate of counsel.

In the *Fourth Circuit* the following sentence is added to the above: "But such petition shall not operate to stay the mandate or other process provided for in Rule 32, except by special order of the court."

Fifth Circuit—A petition for a rehearing after judgment can be presented only during the term at which judgment is entered, and within twenty days after such entry, unless by special leave granted by the court, and must be printed and briefly and distinctly state its grounds without argument, and be supported by certificate of counsel; and will not be granted or permitted to be argued unless a judge who concurred in the judgment desires it, and a majority of the court so determines.

In the *Sixth Circuit* the rule is numbered 28 and reads as follows:

A petition for rehearing after judgment can be presented only within thirty days (at the same or succeeding term) after the day when the printed opinion of the court is filed and can be obtained by counsel for the parties (which date the clerk shall note upon the docket), unless by special leave granted during such thirty days by the court or a judge thereof—and must be printed, and briefly and distinctly state its grounds, and be supported by certificate of counsel; and will not be granted, or permitted to be argued, unless a judge who concurred in the judgment desires it, and a majority of the court so determines.

In the *Seventh Circuit* the rule is numbered 27 and reads as follows:

A petition for rehearing must be filed within thirty days after entry of judgment or decree, or after filing of the opinion shall be in print, and be served forthwith by copy upon the opposing party, who within twenty days from such service may file a printed answer, and the petition shall be determined without oral arguments, unless otherwise ordered.

If a petition be not filed within the time allowed, and upon the overruling of a petition, the clerk shall, without special order, issue the mandate of the court to the court below. Twenty copies of such petition or answer shall be filed with the clerk of this court.

In the *Eighth Circuit* the rule reads as follows:

(1) The petition for rehearing may be presented and filed within sixty days after the date of the judgment or decree and jurisdiction to hear and decide the question presented thereby is reserved notwithstanding lapse of the term within the sixty days.

(2) Such petition for rehearing must be printed and twenty copies thereof filed with the clerk and must briefly and distinctly state its grounds and be supported by a certificate of counsel and will not be granted or permitted to be argued unless a judge who concurred in the judgment desires it and a majority of the court so determines.

Ninth Circuit—A petition for rehearing may be presented within thirty days after judgment. It must be printed, and briefly and distinctly state its grounds, and be supported by certificate of counsel that in his judgment it is well founded, and that it is not interposed for delay. Twenty printed copies must be filed with the clerk of this court.

Decisions

The requirement that a petition for a rehearing shall be presented only at the term at which the decree is entered is entirely for the protection of the court, and can be waived by it when justice requires. *Burget v. Robinson*, 123 *Fed. R.* 262-264, 59 *C. C. A.* 260.

Where a defeated party applies to an appellate court he must be presumed to have exhausted his remedies if his application is refused. Where an application for a writ of certiorari to the Supreme Court presents the same issues determined by the Circuit Court of Appeals, and such application has been denied, the Circuit Court of Appeals will ordinarily refuse to proceed anew on the same subject-matter by the allowance of a rehearing. *Ib.* 266.

A petition for rehearing not supported by certificate of counsel as provided by Rule 29 should be denied, but the court may consider the petition on its merits. *Hinds v. Keith*, 57 *Fed. R.* 10-15, 6 *C. C. A.* 231.

On a petition for rehearing, especially in an equity case, no new matter can be introduced, except in special cases, and then only after

leave is granted by the court. The clerk is not authorized to file with the petition for rehearing affidavits without leave of the court first obtained. *Gregory v. Pike*, 67 *Fed. R.* 837-852, 15 *C. C. A.* 33.

That a case is one of great importance is not sufficient ground for granting a rehearing where it is not suggested that the court has overlooked any consideration or authority which should have had weight in the decision of the cause. *Canfield v. United States*, 67 *Fed. R.* 17-18, 14 *C. C. A.* 228.

A motion to the court to rescind its decree and affirm the decree of the District Court because of the insufficiency of the proof upon a particular point, is not a petition for rehearing and will not be considered where it fails to comply with the requisites prescribed by Rule 29. *The Dago*, 63 *Fed. R.* 182-183, 11 *C. C. A.* 117.

On a petition for rehearing, counsel may not ask a rehearing on grounds which are in conflict with their original argument, or abandon grounds maintained in the first instance, and seek a rehearing upon new questions presented upon such petition for rehearing. It is too late to present a question for the first time on a petition for rehearing. *Merriman v. Chicago & E. I. R. Co.*, 66 *Fed. R.* 663-664, 14 *C. C. A.* 36.

Only in extreme cases will a court permit points not brought to the attention of the court on the original argument to be assigned in a petition for rehearing. *United States v. Hall*, 63 *Fed. R.* 472-475, 11 *C. C. A.* 294.

Upon an application for a rehearing upon the ground of newly-discovered evidence, where no sufficient reason is shown why the facts were not ascertained and proven while the case was open for proof, *Held*, that the petition should be denied, although the petition sets out that the facts were not known to the party, and were known to the witnesses of the other party, but not disclosed when they gave their testimony. *The Iron Chief*, 63 *Fed. R.* 389-394.

The Circuit Court of Appeals will not grant leave to apply to the Circuit Court for permission to file a supplemental bill in the nature of a bill of review to introduce newly-discovered evidence, unless the newly-discovered evidence offered, had it been in the original record, would probably have changed the conclusion to which the court came and its decree entered thereon. *Lafferty Mfg. Co. v. Acme Signal & Mfg. Co.*, 143 *Fed. R.* 321, 74 *C. C. A.* 521.

On motion to dismiss the appeal and that the cause be remanded to the lower court with directions to said court to allow proposed

amendments of the bill therein, such motion being made upon the ground of excusable inadvertence and mistake on the part of appellants and their principal attorney in failing to make certain amendments in the bill, and alleging that the facts embraced in the proposed amendments had only lately been discovered, *Held*, that the Court of Appeals was without power to direct that amendments be made in the trial court after the term at which the decree was rendered, citing *Roemer v. Simon*, 91 *U. S.* 149, where it is said: "It is clear that after an appeal in equity to this court, we cannot, upon motion, set aside the decree of the court below and grant a rehearing." *Strand v. Griffith*, 135 *Fed. R.* 739-741, 68 *C. C. A.* 377.

Where facts have been found and stated to the Supreme Court as the basis for its instructions, after those instructions are received, the court will not re-examine upon the evidence already considered, controverted questions of fact. *A. B. Dick Co. v. Henry*, 118 *C. C. A.* 293.

After the mandate has gone to the trial court, application for a stay of proceedings to allow plaintiff in error to apply for certiorari should be made in the lower court. *Oceanic Steam Navigation Co. v. Watkins*, 188 *Fed. R.* 909, 110 *C. C. A.* 543.

Where a bill of review is proposed for the purpose of vacating or modifying a decree in the lower court, the permission of the appellate court to file the same must first be obtained. As the decree proposed to be reviewed is in fact the decree of the appellate court, the sufficiency of the reasons for disturbing such decree ought to be determined by the appellate court rather than by the court whose hand has entered it. *Keith v. Alger*, 124 *Fed. R.* 32-33, 59 *C. C. A.* 552.

A bill of review in the Federal courts must ordinarily be filed within the time limited by the statute for taking an appeal from the decree sought to be reviewed, where the review is not founded on matters discovered since the decree. *Thomas v. Harvie's Heirs*, 10 *Wheat.* 146-150, 6 *L. ed.* 287.

RULE XXX—*Interest*

First and Fourth Circuits—(1) In cases where a writ of error is prosecuted in this court, and the judgment of the inferior court is affirmed, the interest shall be calculated and levied from the date of the judgment below, until the same is paid, at the same rate that similar judgments bear interest in the courts of the State where such judgment was rendered.

Interest from date of
judgment below; rate.

(2) In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at a rate not exceeding ten per cent, in addition to interest, shall be awarded upon the amount of the judgment.

(3) The same rule shall be applied to decrees for the payment of money in cases in equity, unless otherwise ordered by this court.

(4) In cases in admiralty, damages and interest may be allowed, if specially directed by the court.

In the *Third and Seventh Circuits*—Rule 28 corresponds and is identical with the above rule, except in the Seventh Circuit a fifth clause is added which reads as follows:

(5) In case where money is paid into court any party in suit may move for an order that the clerk deposit the sum under direction of the court. On depositing on such order the clerk shall account for such interest as he may have collected on the fund. But without such order he shall not be required to account for interest.

In the *Second, Fifth, Eighth, and Ninth Circuits* the words “or territory” follow the word “state” in the last line of Clause 1.

In the *Sixth Circuit* the rule is numbered 26 and reads:
(1) Where a judgment or decree of the District Court at law, in equity, bankruptcy or admiralty, requiring the payment of money, is affirmed by this court, interest thereon from its date and until payment shall be calculated and levied at the same rate borne by similar judgments or decrees in the courts of the State where such District Court sits.

(2) Where, in any such case, the review in this court has delayed proceedings to collect the award in the District Court, and shall appear to this court to have been had or prosecuted merely for delay, damages at a rate not exceeding ten per cent of the award, and in addition to interest, may be imposed by this court.

Decisions

The party who appeals from a decree in his favor in a collision cause is not entitled to interest on the original recovery pending the appeal,

since interest is given for delay in satisfying a decree, and the party who appeals puts it out of the power of the opposite party to pay the decree. *The Express*, 59 *Fed. R.* 476, 8 *C. C. A.* 182.

It was intended by Rule 30, where decrees for the payment of money were on appeal affirmed, to give interest on the decrees so affirmed from the date of their entry in the lower court until paid, if by the law of the State interest might have been required in a State court in a similar case. *Hagerman v. Moran*, 35 *Fed. R.* 97.

In the Federal court interest may be allowed from the rendition of the decree affirmed until payment, although the decree was silent concerning a payment of interest or its rate, and though a practice of the State courts requires that the decree in terms provide for the payment of interest. *Ib.* 100.

Where the mandate simply affirms the decree of the lower court which is silent concerning the payment of interest, that court can go no further than its provisions direct. There is no rule of the Circuit (District) Court providing for interest, and it is only through the mandate of the Circuit Court of Appeals, directing its allowance in the court below, that interest may be obtained. *Ib.* 101.

In equity and admiralty the allowance of interest on damages, as also on costs, is not an absolute right; it depends on circumstances and is largely in the discretion of the court. *The Scotland*, 118 *U. S.* 507-519, 30 *L. ed.* 153.

RULE XXXI—Costs

First Circuit—(1) In all cases where any suit shall be dismissed in this court, except where the ~~Costs on dismissal.~~ dismissal shall be for want of jurisdiction, costs shall be allowed to the defendant in error or appellee, unless otherwise agreed by the parties.

(2) In all cases of affirmance of any judgment or decree in this court, costs shall be allowed to ~~Costs on affirmance.~~ the defendant in error or appellee, unless otherwise ordered by the court.

(3) In cases of reversal of any judgment or decree in this court, costs shall be allowed to the plain- ~~Costs on reversal.~~ tiff in error or appellant, unless otherwise ordered by the court.

(4) The cost of the transcript of the record from the court below shall be taxable in that ~~Costs of transcript taxable.~~ court as costs in the case.

(5) Neither of the foregoing sections shall apply to cases where the United States are a party; United States exempt from costs. but in such cases no costs shall be allowed in this court for or against the United States.

(6) When costs are allowed in this court, it shall be the Costs inserted in mandate. duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below, and annex to the same the bill of items taxed in detail.

(7) In all cases certified to the Supreme Court or removed On certiorari to Supreme Courts, fees of clerk to be paid. thereto by certiorari or otherwise, the fees of the clerk of this court shall be paid before a transcript of the record shall be transmitted to the Supreme Court.

In the *Second, Third, Fourth and Fifth Circuits* the rule is substantially the same, except that Clauses 3 and 4 are numbered Clause 3, and Clauses 5, 6 and 7 become Clauses 4, 5 and 6 and in the *Second Circuit*, the third clause reads as follows:

In cases of reversal of any judgment or decree in this court costs shall be allowed the plaintiff in error or appellant unless otherwise ordered by the court. The cost of the transcript of the record from the court below shall be taxable in this court as part of such costs and the clerk of the court below shall send to the clerk of this court with the transcript of the record a certificate of the cost of such transcript.

In the *Third Circuit* the table of costs is printed as Clause 7 of Rule 29.

In the *Fourth Circuit*, Clause 3 reads as follows:

(3) In cases of reversal of any judgment or decree in this court costs shall be allowed to plaintiff in error or appellant unless otherwise ordered by the court. The costs of the transcript of the record and proofs from the court below and the expense of printing the same when printed below shall be taxable in that court as costs in the case. The expense of printing however shall be taxed at actual costs (to be shown by the affidavit of the printer), but in no event to exceed twenty cents per folio of a hundred words.

In the *Sixth Circuit* the rule is numbered 27 and reads as follows: (1) Where any case shall be dismissed out of

this court for lack of jurisdiction herein, only such costs as are incidental to hearing and determining the question of jurisdiction will be awarded; in all other cases (except when provided by statute or general rule), upon the final disposition of a proceeding in this court, costs will be awarded to the party here prevailing, unless the court, by special direction, denies, otherwise awards or apportions the costs.

(2) In cases to which the United States is a party, no costs in this court will be awarded.

(3) In denying or apportioning costs under Clause 1, the court will enforce, as far as possible, the duty of each party to confine within the limits prescribed by Rules 10 and 15 the bill of exceptions, statement of evidence and transcript.

(4) The cost of stenographers' transcripts of testimony used in settling a bill of exceptions or a statement of evidence, will not be taxed in this court, but shall be awarded and taxed by the court below after mandate, as this court may direct, or, lacking such direction, as to that court shall seem proper.

(5) When costs are allowed, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate or other process sent to the court below, and annex to the same a bill of items taxed in detail.

(6) The proper fees of the clerk therefor shall be paid before any transcript of the record in any case shall be transmitted to the Supreme Court.

The same table of costs as promulgated by the Supreme Court February 28, 1898, is printed at length after the rule.

Clause 7, under Rule 29 in the *Third*, and under this rule in the *Fourth and Sixth Circuits*: In pursuance of the Act of Congress of Feb. 19, 1897 (29 *Stats.* 536, c. 263), as amended February 28, 1898, the following table of fees and costs in the Circuit Court of Appeals has been established, to take effect on the first day of March, A. D., 1898:

Docketing a case and filing the record	\$5.00
Entering an appearance25
Transferring a case to the printed calendar	1.00
Entering a continuance25

Filing a motion, order, or other paper	\$.25
Entering any rule, or making or copying any record or other paper, for each 100 words20
Entering a judgment or decree	1.00
Every search of the records of the court and certifying the same	1.00
Affixing a certificate and a seal to any paper	1.00
Receiving, keeping and paying money, in pursuance of any statute or order of the court, one per cent on the amount so received, kept and paid.	
Preparing the record for the printer, indexing same, supervising the printing, and distributing the copies for each printed page of the record and index25
Making a manuscript copy of the record, when required by the rules, for each 100 words (but nothing in addition for supervising the printing)20
Issuing a writ of error and accompanying papers, or a mandate or other process	5.00
Filing briefs, for each party appearing	5.00
Copy of an opinion of the court, certified under seal, for each printed page (but not to exceed \$5.00 in the whole for any copy)	1.00
Attorney's docket fee	20.00

In the *Seventh Circuit* the corresponding rule is numbered 29.

In the *Eighth Circuit*, Clause 1 omits the words "except for want of jurisdiction," otherwise the rule is as in the First Circuit, except that Clauses 3 and 4 is Clause 3 which reads as follows:

(3) In cases of reversal of any judgment or decree in this court costs shall be allowed to plaintiff in error or appellant unless otherwise ordered by the court. Where the record has been printed in this court under the provisions of secs. 1 and 2 of Rule 23, the cost of printing thirty copies of the transcript of record from the court below shall be taxed as costs in the case unless otherwise ordered by this court, but no allowance shall be made for the amount paid to the clerk of the court below for the written or typewritten tran-

script of the record. Where the record has been printed in the court below and a copy of such printed record certified to this court the cost of printing twenty-five copies of such record or portion thereof shall be taxable as costs in the case in the court below unless otherwise ordered by this court.

Clause 3, in the *Ninth Circuit*, is as in the First Circuit with the following, "including costs of the transcript from the court below, unless otherwise ordered by the court." Clauses 5, 6, and 7, in the First Circuit, are numbered 4, 5, and 6 in the Ninth.

Clause 7, in the *Ninth Circuit*, is as follows: (7) Upon the clerk's producing satisfactory evidence, by affidavit or the acknowledgment of the parties or their sureties, of having served a copy of any bill of fees due by them, respectively, in this court, on such parties or their sureties, an attachment shall issue against such parties or sureties, respectively, to compel payment of said fees.

Decisions

Where the order of the court was that the judgment of the court below be affirmed with costs, it was held proper to tax an attorney's fee of \$20.00, which was allowed by the court below against the plaintiff in error. *Kansas City, Ft. S. & M. R. Co. v. MacDonald*, 60 *Fed. R.* 522-523, 9 *C. C. A.* 129.

Where the appellant fails to succeed in reversing the decree, but only in modifying it in a minor particular, neither party will recover costs in the appellate court. *Packard v. Lacing Studd Co.*, 70 *Fed. R.* 66-68, 16 *C. C. A.* 639.

The Circuit Court of Appeals where it reverses the decree for want of jurisdiction in the Circuit (District) Court, may award the appellant costs in the Circuit (District) Court and divide the costs of the appeal. *Tug River C. & S. Co. v. Brigel*, 70 *Fed. R.* 647-648, 17 *C. C. A.* 367.

A decree for costs against respondents, complainants in the court below, will not be modified so as to allow the decree for costs to be set off against the debt due by the appellant to the appellee. *Ib.* 648.

Where the judgment of the Circuit (District) Court is reversed and the cause remanded with instructions to dismiss for want of jurisdiction, all of the costs, both on appeal and in the Circuit (District) Court, should be paid by the plaintiff in the court below. *Sneed v. Sellars*, 68 *Fed. R.* 729-730, 15 *C. C. A.* 631.

Where objection for want of jurisdiction was not urged in the court below, but presented upon bill of exceptions, as the writ of error in such case is superfluous because the objection might have been taken *in limine*, costs will be awarded against the party taking the writ of error or appeal. *Hunt v. Howes*, 74 *Fed. R.* 657-659, 21 *C. C. A.* 356.

Where the appeal has substantially prevailed, the appellant is entitled to the statutory costs incurred in the successful attempt to assert his right. *Northern Trust Co. v. Snider*, 77 *Fed. R.* 813-321.

Where a decree in favor of claimant upon a libel is reversed on appeal on the ground that both vessels were in fault, appellant is entitled to costs incurred in securing a proper modification of the decree. *The Umbria*, 59 *Fed. R.* 475, 8 *C. C. A.* 181.

Where there is much irrelevant matter introduced into the case by the complainant, and carried into the record on appeal, the respondent, though unsuccessful, will not be required to pay the costs in the Circuit (District) Court, which were caused by this class of evidence. *Ecaubert v. Appleton*, 67 *Fed. R.* 917-925, 15 *C. C. A.* 73.

The costs in one court cannot be set off against the costs and damages in another court, so as to prevent the officers of the courts from collecting the sums due them as fees. *Aiken v. Smith*, 57 *Fed. R.* 423-424, 6 *C. C. A.* 414.

A contention that the fees allowed officers are unattachable against the party requiring their services, and if they fail to require prepayment or security in advance they cannot look to the party cast, nor claim any benefit under the judgment or decree rendered in the case, not sustained. *Ib.* 425.

If a decree rendered in the appellate court is not such as the party conceives he is entitled to, seasonable application must be made for its modification. The court has no power to modify a decree after the term at which it was entered has expired, even upon the question of costs. *Jourolman v. East Tennessee Land Co.*, 85 *Fed. R.* 251, 29 *C. C. A.* 140.

Where the decree of the Court of Appeals is in terms with costs without more, and this is the form of the mandate, the question of the costs in the court below is subject to the power of that court. *Ib.* 251.

The appellate court may entertain a petition for leave to file a bill of review in the court below, even after a decree and mandate, and after the term at which the decree was entered. In case the petition is granted, the usual order is that petitioner have permission to apply

to the court below to file further pleadings. *In re Gamewell Fire-Alarm Tel. Co.*, 73 *Fed. R.* 908-911-913, 20 *C. C. A.* 111.

In the Second Circuit under the Act of Feb. 13, 1911, to reduce the expenses of appeals and authorizing the use on appeal of the printed transcripts certified by the court below, *Held*, the certification of the clerk of the court below is sufficient to establish the correctness of the transcript and there is no necessity for further examination by the clerk of the Circuit Court of Appeals.

Held further that the record should be indexed by the clerk of the appellate court for which his fee is 25 cents for each page of such index but as the clerk's fees were held indivisible in *Bean v. Patterson*, 110 *U. S.* 401, 28 *L. ed.* 190, the clerk should take his full fees allowed by the fee bill prescribed February 28, 1898, by the Supreme Court, namely, 25 cents per page for each printed page of the record, and hold the same as a special deposit until distributed by proper authority. *Colts, etc., Co. v. N. Y. Sporting Goods Co.*, 186 *Fed. R.* 625, 108 *C. C. A.* 489.

The District Court has power to issue an execution for the costs in the Circuit Court of Appeals which may be annexed to the mandate sent down from that court and taxed in the appellate court in conformity with Rule 31 (Rule 29 in the Seventh Circuit). *Corn Products Co. v. Chicago, etc., Co.*, 185 *Fed. R.* 63, 107 *C. C. A.* 283.

The enforcement of the costs taxed in the appellate court should be enforced in the trial court pursuant to sec. 701, *Rev. Stats. (U. S. Comp. Stats. 1901, p. 571)*.

NOTE. This case decided January 3, 1911, refers to sec. 701, *Rev. Stats., U. S. Comp. Stats. 1901, p. 571*, as if in full force. *Ib.*

RULE XXXII—*Mandate*

First Circuit—In every case finally determined, a mandate or other proper process, in the nature of a *procedendo*, shall be issued to the court below, for the purpose of informing that court of the proceedings in this court, so that further proceedings may be had in the court below, as to law and justice may appertain. Such mandate or other process may issue at any time on the order of the court; but, unless otherwise ordered, it shall issue as of course after two calendar months from the entry of the judgment, unless a petition for a rehearing has been filed and remains undisposed of.

Second and Eighth Circuits—In all cases finally determined in this court, a mandate, or other proper process in the

nature of a *procedendo*, shall be issued, on the order of this court, to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain.¹

Third Circuit—The corresponding rule is numbered 30 and reads as in the Fourth Circuit except that the time for issuance as of course is thirty days from entry of the decree, or judgment.

Fourth Circuit—To the above rule in this circuit are added these words: "Such mandate or other process may issue at any time on the order of the court; but, unless otherwise ordered, it shall issue as of course after the expiration of twenty days from the date of the judgment or decree.

Fifth Circuit—Mandates shall issue at any time after twenty-one days from the date of the decision unless an application for a rehearing has been granted or is pending. A copy of the opinion of this court shall accompany the mandate when a new trial or further proceedings are to be had in the lower court and the charge for such copy shall be taxed in the costs of the case.

Provided, that in all cases entitled to precedence in this court under sec. 7 of the Act approved Mar. 3, 1891, the mandate or other proper process may be issued by the clerk after the expiration of seven days from the date of the decision, unless otherwise ordered by the court or one of the judges thereof.

Sixth Circuit, the rule is numbered 29 and reads as follows: In all cases finally determined in this court a mandate or other proper process in the nature of a *procedendo* shall be issued, on the order of this court, to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain.

Such mandate shall not issue until time has elapsed for filing a petition to rehear as defined by Rule 28; and no mandate or other process of *procedendo* shall issue when a petition to rehear is pending, unless specially ordered.

¹ See Rule 36, Second Circuit, page 347.

Every mandate shall be accompanied by a copy of the opinion filed in the cause in which it is issued, and the charge for the same shall be taxed in the costs of the case. In cases not requiring special form of process, the mandate (unless otherwise directed by the court or a judge thereof) shall be issued by the clerk upon the expiration of the time for filing rehearing petition, or upon the denial of such petition, and as well in vacation as in term time.

Seventh Circuit—Rule 30, corresponding with Rule 32 of the other circuits, is the same as Rule 32 of the Eighth Circuit as given below.

Eighth Circuit—In all cases finally determined in this court, a mandate or other proper process in the nature of a *procedendo* shall be issued on the order of this court, to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain.¹

Ninth Circuit—In all cases finally determined in this court, a mandate or other proper process in the nature of a *procedendo* shall upon the payment of any costs due in the case, be issued, as of course, from this court to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain. Such mandate, if not stayed by the order of the court, shall be issued on the expiration of thirty days, from the date of such final determination, unless within said time a petition for rehearing be filed, in which case the mandate shall be stayed until five days after the determination of such petition.

Decisions

Where the Supreme Court has expressly stayed a mandate of the Circuit Court of Appeals, the suit remains in the latter court, and that court may grant a rehearing even after the term. *Burget v. Robinson*, 123 *Fed. R.* 262-265, 59 *C. C. A.* 260.

It is well-settled practice in the Federal courts of appeal in reviewing equity causes to dispose of them finally on the record before the appellate

¹ By an order entered March 30, 1911, the clerk is directed to issue a mandate or other proper process, to the court below, in all cases, sixty days after the final disposition thereof, excepting in cases where it shall be otherwise expressly ordered.

court and not remand them for further trial in the District Court. *Harrison v. Clarke*, 182 *Fed. R.* 765, 105 *C. C. A.* 197-199.

No rule is better settled than that an appeal from a decree entered by the court below in accordance with the mandate of the appellate court, cannot be maintained.

If the Circuit Court of Appeals committed error, or if for any reason its judgment can be held void the appropriate remedy lies in a certiorari from the Supreme Court. *Aspen, etc., Co. v. Billings*, 150 *U. S.* 37, 37 *L. ed.* 988.

Where the verdict and judgment was excessive but the judgment was capable of correction by computation merely there need be no new trial if the judgment is reduced to the proper amount by a remittitur filed by defendant in error. *Van Boskerck v. Torbert*, 184 *Fed. R.* 419, 107 *C. C. A.* 383.

Where the only error found was in allowing damages, where the element of damages as to which the error in the trial court occurred was only an incidental one, easily distinguishable on the record, and no complaint that upon the main issue the trial was otherwise than lawful, *Held*, the judgment would be reversed, the verdict set aside and the case remanded for a new trial on the issue of damages alone. *Farrar v. Wheeler*, 145 *Fed. R.* 482, 75 *C. C. A.* 386-390.

At common law when a judgment is reversed upon an error relating to damages the entire verdict must be set aside and a *venire de novo* ordered. *Held*, this rule has been changed by sec. 701, *Rev. Stats. Ib.*, p. 390.

NOTE. Sec. 701, *Rev. Stats., U. S. Comp. Stats.* 1901, p. 571, is not one of the sections repealed by the Judicial Code, but as it gave jurisdiction to the Supreme Court of causes now assigned to the Circuit Court of Appeals quære whether it is still in force. See Act March 3, 1891, c. 517, secs. 10 and 11, 26 *Stat.* 829 (*U. S. Comp. Stat.* 1901, p. 552).

RULE XXXIII—*Custody of Prisoners on Habeas Corpus*

First, Second, Fourth, Fifth, Sixth, Eighth, and Ninth Circuits—(1) Pending an appeal from the final decision of Custody of prisoner. any court or judge declining to grant the writ of habeas corpus, the custody of the prisoner shall not be disturbed.

(2) Pending an appeal from the final decision of any Prisoner remanded or court or judge discharging the writ after admitted to bail, on discharge of writ. it has been issued, the prisoner shall be remanded to the custody from which he was taken by the

writ, or shall, for good cause shown, be detained in custody of the court or judge, or be enlarged upon recognizance, as hereinafter provided.

(3) Pending an appeal from the final decision of any court or judge discharging the prisoner, Discharged prisoner admitted to bail, pending appeal. he shall be enlarged upon recognizance, with surety, for appearance to answer the judgment of the appellate court, except where, for special reasons, sureties ought not to be required.

In the *Third and Seventh Circuit*, Rule 31 is identical with Rule 33 as here printed.

In the *Sixth Circuit* the rule is numbered 32.

In the *Seventh Circuit*, Rule 33 is as follows:

(1) The library of the court shall be under the general supervision and custody of the clerk of Law library. the court.

(2) No book shall be removed from the library except by or upon the written order of a Federal judge or the United States district attorney for his own use in Chicago, except that during the sessions of the court any lawyer who has a case upon the docket, upon written application to the clerk and upon the clerk's written order, may take from the library not exceeding three volumes at a time, being responsible for the return thereof within twenty-four hours, and in default of return shall pay to the clerk for the library fund twice the value thereof, but if returned in good condition one dollar for each day's detention beyond the limited time.

RULE XXXIV—*Models, Diagrams, and Exhibits of Material*

First, Fourth, Fifth, Sixth, Eighth, and Ninth Circuits—

(1) Models, diagrams, and exhibits of material forming part of the evidence taken Models, etc., in custody of the marshal. in the court below, in any case pending in this court, on writ of error or appeal, shall be placed in the custody of the marshal of this court at least ten days before the case is heard or submitted.

(2) All models, diagrams, and exhibits of material placed

in the custody of the marshal for the inspection of the court on the hearing of a case, must be taken away by the parties within one month after the case is decided. When this is not done, it shall be the duty of the marshal to notify the counsel in the case, by mail or otherwise, of the requirements of this rule; and, if the articles are not removed within a reasonable time after the notice is given, he shall destroy them, or make such other disposition of them as to him may seem best.

Second Circuit, Clause 1 is as in the First Circuit and Clauses 2 and 3 as follows:

(2) Three copies must be furnished for the use of the court of any maps, charts, plans, diagrams or other papers or documents which it is intended to refer to on the argument, and which are not contained in the transcript of the record as certified from the court below.

(3) All exhibits of material in customs cases must be filed with the clerk at the time of filing the transcript of record, and such exhibits will be returned to the clerk of the District Court at the expiration of 60 days from the decision of the case by this court. All other models, diagrams, and exhibits of material placed in the custody of the clerk for the inspection of the court on the hearing of a case must be taken away by the parties within one month after the case is decided. It shall be the duty of the clerk to notify the counsel in the case, by mail or otherwise, of the requirements of this rule, and if the articles are not removed within the time above specified, he shall destroy them, or make such other disposition of them as to him may seem best.

In the *Third and Seventh Circuits* the corresponding rule is numbered 32, and is substantially identical with the rule in the First Circuit.

In the *Sixth Circuit* the rule is numbered 30.

RULE XXXV—*Error in Criminal Cases*

First Circuit—On or after the allowance of a writ of error in a criminal case cognizable by this court, the justice or judge who allowed the writ, or the court which entered the judgment or any

Judge or justice may admit to bail.

judge thereof, shall have the power to admit to bail the plaintiff in error, according to the rules of law applicable to his case.

Second Circuit—(1) An appeal or writ of error from a Circuit Court or a District Court to this court in the cases provided for in secs. 6 and 7 of the act entitled “An Act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States and for other purposes,” approved Mar. 3, 1891, and acts to amend said act approved Feb. 18, 1895, and Jan. 20, 1897, may be allowed in term time or vacation by the circuit justice or by any circuit judge within the circuit or by any district judge within his district, and the proper security be taken and the citation be signed by him, and he may also grant a *supersedeas* and stay of execution or of proceedings, pending such writ of error or appeal.

(2) Where such writ of error to this court is allowed in the case of a conviction of an infamous crime or in any other criminal case in which it will lie, the District Court, or the judge thereof, or any circuit judge of the circuit or the circuit justice shall have power, after the citation is served, to admit the accused to bail in such amount as may be fixed.

In the *Third Circuit* there is no rule after Rule 32.

Fourth Circuit—There is no corresponding rule. Rule 35 reads: *Saturdays Conference-day*. The clerk in making his docket shall not set down for argument any cause for any Saturday of the term for which such docket is intended, and this court will meet on said days for consultation only.

Fifth Circuit ¹—Rule 35 reads: *Order in Relation to Assignment of Cases for Hearing*. Unless otherwise ordered by the senior circuit judge, thirty days prior to the opening of a regular session of this court, the clerk is directed to assign cases for hearing as follows:

At Atlanta, Georgia, four cases per day for the first three days of each week.

At Montgomery, Alabama, four cases per day for the first three days of each week.

¹ See Rule 37, Fifth Circuit, page 350.

At Fort Worth, Texas, four cases per day for the first three days of each week.

At New Orleans, Louisiana, two cases per day for the first three days of each week.

The above assignments shall be made in accordance with existing law regulating the return of appeals, writs of error, and other appellate proceedings in the Fifth Judicial Circuit: *Provided*, that cases entitled by law to preference in hearing and bankruptcy cases shall be first assigned, and cases, whether preference or not, may, upon stipulation of the parties filed with the clerk and approved by the court, be assigned for hearing at any other place or session of this court designated in such stipulation.

Except as hereinabove provided, the assignment of cases at New Orleans, Louisiana, shall be grouped by States, so as to permit the hearing of cases from one State before the cases from the next State in order shall be called.

The *Sixth and Seventh Circuits* have no Rule after Rule 34.

Eighth Circuit—Writs of Error in Criminal Cases. (1)

Writs of error in criminal causes allowed in vacation, by whom.

Writs of error to review criminal cases tried in any District Court of the United States within this circuit, which may be reviewed under the provisions of the Judicial Code approved Act of Mar. 3, 1911, may be allowed in term time or in vacation by the circuit justice assigned to this circuit, or by either of the circuit judges within the circuit, or by any district judge within his district, and the proper security be taken, and the citation signed by him, and he may also grant a *supersedeas* and stay of execution or proceedings, pending the determination of such writ of error.

Supersedeas, by whom and when granted.

(2) Where such writ of error is allowed in the criminal cases aforesaid, the District Court before which the accused was tried, or the district judge of the district wherein he was tried, within the district, or the circuit justice assigned to the circuit, or either of the circuit judges within the circuit shall have the power, after the citation has been duly served, to admit the accused to bail in such amount as may be fixed, such

Who may admit to bail, and when.

bail bond to be, as near as may be, in the form prescribed in the appendix to these rules.

The *Fifth Circuit* gives the above rule as Rule 37. See *infra*, page 350.

Ninth Circuit—Rule 35 is entitled: *Assignment of Causes for Hearing*, and reads as follows:

(1) Thirty days prior to the opening of any calendar session of the court, the clerk is directed to assign causes for hearing at the rate of one case for the first day of each term or session, and two cases per day for each of the ensuing days of such term or session. Causes shall be grouped by States, and assignments made, so as to permit the hearing of causes from one State before the causes from the next State in order shall be called; causes from the northern district of California shall be assigned for hearing last. Any causes entitled by law to preference in hearing shall be first assigned and take precedence over other causes from the same State.

(2) A stipulation to continue a case to the foot of the calendar or in any way change the day assigned for hearing, will not be recognized as binding upon the court, and no such change will be made except by order of the court for reasons shown.

(3) Ten days before each calendar session of the court the clerk shall prepare and cause to be printed a calendar of the causes assigned for the approaching session.

RULE XXXVI—*Petitions in Bankruptcy Cases*

First Circuit—(1) On the filing of a petition for the exercise of the power of superintendence and revision vested in this court by the act to establish a uniform system of bankruptcy throughout the United States, approved July 1, 1898, or any acts in addition thereto or amendatory thereof, the clerk shall issue, as of course, an order to show cause, returnable two weeks from the date thereof, which shall be served by copy on each of the adverse parties named in the petition as a person against whom relief is desired, or his solicitor in the proceeding in the District

In bankruptcy causes, on petition filed, clerk to issue notice.—Service to be by marshal.

Court, at least one week before the return-day of the order, which service shall be made by the marshal or his deputy in the district where the party or solicitor served resides.

(2) Within one calendar month after the return-day of the order to show cause, either party may demur, plead, or answer; but the determination of any demurrer, plea, or answer shall be final, and no order to plead over will be allowed; and any party may secure in his answer all the advantages of a demurrer or plea, or both, by inserting therein the proper allegations therefor. No demurrer shall be general, and no cause of demurrer shall be allowed unless specifically set forth therein.

(3) There shall be no pleadings in reply by the petitioner; but any new matter properly in reply shall be available without the same being pleaded in the petition, or otherwise.

(4) A motion to dismiss may be filed within the time allowed for a demurrer, plea, or answer; or the subject-matter thereof, if it relates to the substance of the proceeding or to the jurisdiction of the court, may be availed of on demurrer, plea, or answer, by proper allegation; and whenever a motion to dismiss is seasonably filed, the time for filing demurrer, plea, or answer, will run from the day on which an order may be entered overruling the motion. Every motion to dismiss shall be filed in print, accompanied with a printed brief; and each of the opposing parties shall forthwith be served by the clerk, through the mail or otherwise, with a copy of the motion and of the brief, and he may file, in print, a brief in reply within two weeks. At the expiration of the time allowed for filing the brief in reply, the motion and briefs will be distributed by the clerk to the circuit judges, and to the district judge, senior in commission, who is not disqualified. Thereupon, the motion will be disposed of by the court on the briefs, unless, on its own suggestion, or for good cause shown, the court shall order oral arguments.

When pleadings filed.—
Order on pleadings final
with no right to plead
over.—Advantages of
plea or demurrer to be
had by answer.

New matter available
by petitioner without
a reply.

Motion to dismiss.—
Time for filing plea, etc.
—Motion to be printed
and accompanied by
brief, but oral argument
may be allowed.

(5) So much of Rule 14 as relates to *viva voce* proofs in the District Courts, or to further proofs in instance causes, in admiralty, shall Rules as to *viva voce* proof, in instance causes, to apply.

apply to appeals and petitions authorized by the act aforesaid, or by acts additional thereto or amendatory thereof: *Provided*, that any record on any such appeal or petition may be supplemented by any matter agreed to in writing by the parties and filed with the clerk.

(6) The rules with reference to records, printing, and briefs, and all other rules, except as Rules as to printing the record and filing briefs. herein modified, shall apply to the proceedings to which this order relates.

(7) Nothing herein shall prevent the court, from time to time, from making for special cause, orders diminishing or enlarging the times named herein, or any other orders suitable to expedite the proceedings or to prevent injustice.

Second Circuit, Rule 36 is entitled: *Security for Clerks' Fees—Taxing Costs*, and reads as follows:

(1) In all cases the plaintiff in error or appellant on docketing a case and filing a record, shall enter into an undertaking with the clerk, for the payment of his fees, or otherwise satisfy him in that behalf.

(2) At the expiration of ten days after a case has been decided, the order or decree thereon will be entered by the court, and the clerk will thereupon prepare and tax the bill of costs and issue the mandate. Within said ten days the parties may file with the clerk their proposed orders or decrees and bills of costs, with proof of service of the same upon the opposing attorneys.¹

In the *Third Circuit*, there is no Rule 36.

Fourth Circuit—Bankruptcy. Upon the filing of the petition for review as provided for in sec. 24 (b) of the act to establish a uniform system of bankruptcy throughout the United States, approved July 1, 1898, the clerk of this court shall docket the cause, and shall forthwith serve a certified copy of the petition upon the respondent or respondents, or his or their solicitor, through the mail or other-

¹ For the Rule of Practice upon petitions to review orders in Bankruptcy in the Second Circuit see Rule 38, *infra*, page 352.

wise, together with a notice to the respondent or respondents, to answer, demur, or move to dismiss the said petition, within fifteen days from the date of such notice.

(2) The petitioner shall cause a certified transcript of the record and proceedings of the bankruptcy court of the matter to be reviewed to be filed in the clerk's office of this court within forty days from the date of the filing of the said petition for review.

(3) By consent of all parties to the cause, by stipulation in writing filed with the clerk of the court the petitioner may cause a transcript of the record and proceedings of the bankruptcy court of the matter to be reviewed to be filed in the clerk's office of this court in lieu of a certified printed transcript as above mentioned, and thereupon the clerk of this court shall cause the record to be printed as provided in the 23d rule of this court, and furnish counsel on both sides with three copies each.

(4) And such causes shall stand for hearing in their regular order. But either side may, upon ten days' notice given to the opposing counsel, have the cause heard, either at term time, or in vacation, or in chambers, upon the briefs, unless at its own suggestion, or for good cause shown, the court shall order oral argument.

(5) That all causes coming up by appeal as provided in sec. 25 of said Bankruptcy Act shall stand for hearing in this court, either in term time or in vacation, and may be called up by either party upon ten days' notice, as provided in sec. 4 of this rule.

(6) All rules of this court (except as herein modified) shall apply to the proceedings in bankruptcy to which this rule relates.

(7) Nothing herein shall prevent the court, from time to time, from making, for special cause, orders diminishing or enlarging the times named herein, or any other order suitable to expedite the proceeding or to prevent injustice.

Fifth Circuit—Rule 36 is entitled: *Assignment of Judges* and reads as follows:

It is ordered that whenever a full bench of three judges shall not be made up by the attendance of the associate justice of

the Supreme Court assigned to the circuit, and of the circuit judges, so many of the district judges, in the order of the seniority of their respective commissions and qualified to sit, as may be necessary to make up a full court of three judges, are hereby designated and assigned to sit in this court: *Provided, however*, that the court may at any time, by particular assignment, designate any district judge to sit as aforesaid.

The *Sixth and Seventh Circuits* have no Rule 36.

Eighth Circuit—Petition to Revise (under sec. 24b of the Bankruptcy Law): A petition to revise under the provisions of sec. 24b, in the Bankruptcy Law approved July 1, 1898, shall be filed and docketed as an original action in this court and be entitled _____ petitioner v. _____ respondent and shall specifically designate the respondent and respondents upon whom the petitioner desires notice to be served and a sufficient number of copies of such petition shall be furnished the clerk at the time of filing so that a copy may be served upon each of the respondents.¹

Ninth Circuit—Rule 36 is entitled: *Terms and Sessions of the Court* and reads as follows:

(1) One term of this court shall be held annually on the first Monday of October, and adjourned sessions on the first Monday of each month in the year. All sessions shall be held at San Francisco, unless otherwise especially ordered by the court.

(2) The October, February, and May sessions shall be known as calendar sessions, and shall be sessions for the trial of all causes that shall have been placed upon the calendar in pursuance of Rule 35.

(3) A term of this court shall be held annually in the city of Seattle, in the State of Washington, and in the city of Portland, in the State of Oregon. The Seattle term shall be held beginning upon the second Monday in September, and the term at Portland shall be held beginning upon the third Monday in September. All appeals and writs of error from the District Courts for the district of Washington, the

¹ For the notice upon petition to revise in the Eighth Circuit see Rule 38, *infra*, page 352.

transcripts of which shall be filed in this court between the first day of April and the first day of August of each year, shall be heard at said annual term in the city of Seattle, unless it is stipulated by the parties thereto that they be heard at San Francisco. All other appeals and writs of error from said District Courts for those districts, shall be heard at San Francisco unless it be stipulated by the parties thereto that they be heard at said annual term in the city of Seattle. All appeals and writs of error from the District Court for the District of Oregon, the transcripts of which shall be filed in this court between the first day of April and the first day of August of each year shall be heard at said annual term in the city of Portland, unless it be stipulated by the parties thereto that they be heard at San Francisco. All other appeals and writs of error from said District Courts for that district shall be heard at San Francisco, unless it be stipulated by the parties thereto that they be heard at said annual term in the city of Portland. Appeals and writs of error from the District Courts for the districts of Idaho and Montana, and from the District Courts of Alaska, may, upon the stipulation of the parties thereto, be heard at the annual term to be held either at Seattle or Portland.

RULE XXXVII

The *First Circuit* has no rule after Rule 36.

Second Circuit—In the preparation of briefs any citations made from "Federal Cases" must be accompanied by the citation of the original report of the case and where a citation is made from the American Bankruptcy Reports the citation in the Federal Report or United States Supreme Court reports must also be given. If the case is not reported elsewhere than in Federal Cases or American Bankruptcy Reports the fact must be so stated.

The *Fourth Circuit* has no rule after Rule 36.

Fifth Circuit—Rule 37 is entitled *Writs of Error in Criminal Cases*, and is the same as Rule 35 of the Eighth Circuit, p. 344.

The following Form of Appearance Bond on Writ of Error in Criminal Cases is printed as an appendix to Rule 37 in the Fifth Circuit.

Know all Men by these Presents:

That we, ———, as principal, and ——— as sureties, are held and firmly bound unto the United States of America in the full and just sum of ——— dollars, to be paid to the said United States of America, to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this ——— day of ———, in the year of our Lord one thousand nine hundred and ———.

Whereas, lately at the ——— term, A. D. 190—, of the ——— Court of the United States for the ——— district of ———, in a suit pending in said court, between the United States of America, plaintiff, and ———, defendant, a judgment and sentence was rendered against the said ———, and the said ——— has obtained a writ of error from the United States Circuit Court of Appeals for the Fifth Circuit, to reverse the judgment and sentence in the aforesaid suit, and a citation directed to the said United States of America, citing and admonishing the United States of America to be and appear in the United States Circuit Court of Appeals for the Fifth Circuit, at the city of New Orleans, Louisiana, thirty days from and after the date of said citation, which citation has been duly served.

Now the condition of the above obligation is such that if the said ——— shall appear in the United States Circuit Court of Appeals for the Fifth Circuit, on the first day of the next term thereof, to be held at the city of ———, on the first Monday in ———, A. D. 190—, and from day to day thereafter during said term, and from term to term, and from time to time, until finally discharged therefrom, and shall abide by and obey all orders made by the said United States Circuit Court of Appeals for the Fifth Circuit, in said cause, and shall surrender himself in execution of the judgment and sentence appealed from as said court may direct, if the judgment and sentence of the said ——— Court against him shall be affirmed by the said United States Circuit Court of Appeals for the Fifth Circuit, then the above obligation to be void, else to remain in full force, virtue, and effect.

—————[Seal]

—————[Seal]

—————[Seal]

Approved:

—————,
Judge of the ———.

The *Seventh Circuit* has no Rule 37.

Eighth Circuit—Order of Court. (1) Before the filing of a petition to revise (in Bankruptcy), the same shall be presented to the court, or one of the circuit judges, for leave to file the same and for an order fixing the return-day to the notice required by law.

(2) When such petition is accompanied by a written consent that the petition to revise may be filed and a waiver by the respondent or respondents, or their counsel, of such notice, no notice will be issued. In such cases the case will be docketed by the clerk.

Ninth Circuit—Photograph of Chinese to be Attached to Bail Bond. Whenever, in cases of deportation of Chinese, the defendant be admitted to bail pending appeal, before the bond be approved and the party released from custody a photograph of defendant shall be attached to said bond.

RULE XXXVIII—*Review of Orders in Bankruptcy*

Second Circuit—Petitions to review orders in bankruptcy, filed under the provisions of sec. 24 (b) of the Bankruptcy Act, must be filed and served within ten days after the entry of the order sought to be reviewed, and a transcript of the record of the proceedings in the bankruptcy court of the matter to be reviewed must be filed and the cause docketed within thirty days thereafter, but the judge of the bankruptcy court may for good cause shown enlarge the time for filing the petition or record, the order of enlargement to be made and filed with the clerk of this court before the expiration of the times hereby limited for filing the petition and record respectively.

Fourth Circuit—See Rule 36, page 347.

Eighth Circuit—Notice. (1) The notice to be given as provided by law (upon a petition to revise) shall be issued by the clerk of this court, under the seal thereof, and shall be addressed to the defendant or defendants, and be served by the marshal of this court, unless an acknowledgment or acceptance of service thereof is made by the defendant or defendants, or their counsel.¹

Ninth Circuit—No Rule 38.

RULE XXXIX—*Response*

Eighth Circuit—The response to the petition (upon a petition to revise) when the respondent elects to make a

¹ See Rule 36, page 349.

written response, shall be filed within thirty days after the service of the notice or the filing of a waiver thereof.

RULE XL—*Printing of Record*

Eighth Circuit—(1) The clerk shall cause the petition and exhibits thereto if any and the order notice, and response, if any, to be printed as soon as convenient after the response is filed or the time for filing such response has expired and shall distribute the printed copies of same to counsel for the respective parties as soon as the same are printed.

RULE XLI—*Briefs and Arguments*

Eighth Circuit—(1) Twenty copies of the brief and argument in behalf of petitioner shall be printed and filed twenty days before the date set for the hearing, and twenty copies of the brief and argument for the respondent or respondents shall be printed and filed eight days before the date of hearing.

RULE XLII—*Hearing*

Eighth Circuit—(1) Petitions to revise filed in vacation shall be assigned by the clerk for hearing in their regular order at the next session or term of the court in the same manner as appeals and writs of error in other cases.

(2) Petitions to revise filed during a session of the court, when a sufficient showing of urgency is presented, may be set for hearing at that term and upon such terms and conditions as the court may direct.

(3) Petitions to revise assigned by the clerk in their regular order as provided in sec. 1 of this rule, when such assignment is for a day near the close of the session, may be advanced by order of the court and set for an earlier day, upon good cause shown therefor by either of the parties.

RULE XLIII—*Costs*

Eighth Circuit—(1) The costs and fees now provided by law in cases upon appeal or writ of error, shall, so far as the same are applicable, be taxed on petitions to revise.

(2) Upon the determination of a petition to revise such order as to costs will be made as the court may deem necessary.

RULE XLIV—*Procedendo*

Eighth Circuit—(1) In all cases on a petition to revise, wherein the action or judgment of the District Court, complained of, is disapproved by this court, the clerk shall, at the expiration of thirty days from and after the date of entering the decree in this court, issue process in the nature of a *procedendo* to the said District Court for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such District Court, in conformity with the decree of this court.

(2) In all cases on petition to revise, wherein the action or decree of the District Court, complained of, is approved and confirmed, or said petition dismissed by this court, the clerk shall at the expiration of 30 days certify a copy of such decree to the District Court.

RULE XLV—*Appeals and Writs of Error in Bankruptcy Cases*

Eighth Circuit—(1) The appeals and writs of error provided for by sec. 25 of the bankruptcy law, approved July 1, 1898, shall be governed by the same rules and regulations as to costs and procedure as are provided by this court for appeals and writs of error in other cases.

RULES IN ADMIRALTY
IN THE
CIRCUIT COURT OF APPEALS FOR THE
SECOND CIRCUIT

RULE I—*Appeals and New Pleadings*

An appeal to the Circuit Court of Appeals shall be taken by filing in the office of the clerk of the District Court and serving on the proctor of the adverse party a notice, signed by the appellant or his proctor, that the party appeals to the Circuit Court of Appeals from the decree complained of.

The appeal shall be heard on the pleadings and evidence in the District Court, unless the appellate court, on motion, otherwise order.¹

RULE II—*Notice and Bond*

SEC. 1—When a notice of appeal is served, the appellant shall file in the clerk's office of the District Court, a bond for costs of the appeal, with sufficient surety in the sum of two hundred and fifty dollars, conditioned that the appellant shall prosecute his appeal to effect, and pay the costs if the appeal is not sustained. Such security shall be given within ten days after filing the notice, or the appeal shall be deemed abandoned, and the decree of the court below enforced, unless otherwise ordered by a judge of this court.¹

SEC. 2—And if the appellant desires to stay the execution

¹ *Held* in the *Ninth Circuit* that this rule so far modified Rule 11 of the General Rules that a petition for an appeal and the allowance thereof is not required in an admiralty case, nor is the assignment of errors required to be filed with notice of appeal. *Held* further, the assignment of errors must be sent up to the Appellate Court with the apostles as required by Rule 4 of the Admiralty Rules. *Kenney v. Louie*, No. 939. (Motion to dismiss appeal denied, May 6, 1903. No opinion filed.)

of the decree of the court below, the bond which he shall give shall be a bond with sufficient security, in such further sum as the judge of the District Court or a judge of this court shall order, conditioned that he shall abide by and perform whatever decree may be rendered by this court in the cause or on the mandate of this court by the court below.

SEC. 3—The appellant shall, on filing either of such bonds, give notice of such filing, and of the names and residence of the sureties, and if the appellee, within two days, excepts to the sureties, they shall justify, on notice, within two days after such exception.

RULE III—*Review in Part Only*

The appellant may also, at his option, state in his notice of appeal that he desires only to review one or more questions involved in the cause, which questions must be clearly and succinctly stated; and he shall be concluded in this behalf by such notice, and the review upon such an appeal shall be limited to such question or questions.

RULE IV—*Apostles on Appeal to Contain*

SEC. 1—The apostles, on an appeal to this court, shall, in cases where a general notice of appeal is served, consist of the following:

(1) A caption exhibiting the proper style of the court and the title of the cause, and a statement showing the time of the commencement of the suit; the names of the parties, setting forth the original parties and those who have become parties before the appeal, if any change has taken place; the several dates when the respective pleadings were filed; whether or not the defendant was arrested, or bail taken, or property attached, or arrested, and if so, an account of the proceedings thereunder; the time when the trial was had, and the name of the judge hearing the same; whether or not any question was referred to a commissioner or commissioners, and if so, the result of the proceedings and report thereon; the date of the entry of the interlocutory

and final decrees; and the date when the notice of appeal was filed.

(2) All the pleadings, with the exhibits annexed thereto.

(3) All the testimony and other proofs adduced in the cause.

(4) The interlocutory decree and any order of the court which appellant may desire to have reviewed on the appeal.

(5) Any report of a commissioner or commissioners to which exception may have been taken, with the order or orders of the court respecting the same, and the exceptions to the report, and so much of the testimony taken in the proceeding as may be necessary to a review of the exceptions.

(6) All opinions of the court, whether upon interlocutory questions or finally deciding the cause.

(7) The final decree, and the notice of appeal; and

(8) The assignments of error.

SEC. 2—All other papers shall be omitted unless otherwise ordered by the judge who heard the cause.

SEC. 3—Where the appellant shall appeal specially, and seek only to review one or more questions involved in the cause, the apostles may, by stipulation between the proctors for the respective parties, contain only such papers and proceedings and evidence as are necessary to review the questions raised by the appeal.

RULE V—*Certifying Records*

The appellants shall, within thirty days after giving notice of appeal, procure to be filed in this court the apostles certified by the clerk of the District Court, or in case of a special appeal, the stipulated record, with the certification by the said clerk of all papers contained therein on file in his office.

RULE VI—*If Appearance of Appellee not Entered*

If the appellee does not cause his appearance to be entered in this court, within ten days after service on his proctor of notice that the apostles are filed in this court, the appellant may proceed *ex parte* in the cause, and have such decree as the nature of the case may demand.

RULE VII—*New Allegations, etc.*

Upon sufficient cause shown, this court, or any judge thereof, may allow either appellant or appellee to make new allegations or pray different relief, or interpose a new defense, or take new proofs. Application for such leave must be made within fifteen days after the filing of the apostles and upon at least four days' notice to the adverse party (or his attorney of record as the rule in the Ninth Circuit reads.)

RULE VIII—*New Pleadings—New Testimony*

If leave be granted to make new allegations, pray different relief, or interpose a new defense, the moving party shall, within ten days thereafter, serve such new pleading, duly verified, on the adverse party, who shall, if such pleading be a libel, within twenty days answer on oath.

If leave be given to take new testimony, the same may be taken and filed within thirty days after the entry of the order granting such leave, and the adverse party may take and file counter testimony within twenty days after such filing.

RULE IX—*New Testimony—How Taken*

Such testimony shall be taken by deposition, before any United States commissioner, or notary public, upon reasonable notice in writing given to the opposite party; or by commission issued out of this court with interrogatories annexed. Upon proper cause shown, the court may grant an open commission.

RULE X—*Printing New Pleadings and Testimony*

If new pleadings are filed or testimony taken in this court, the same shall also be printed and furnished by the clerk, as in the twenty-third General Rule provided.

RULE XI—*Motions*

All motions shall be made upon at least four days' notice.

RULE XII—*Writ of Inhibition*

A writ of inhibition may be awarded by this court on motion of the appellant to stay proceedings in the court below when circumstances require.

RULE XIII—*Mandamus*

A mandamus may, in like manner, be obtained, to compel a return of the apostles when unreasonably delayed by the clerk, or court, below.

RULE XIV—*Cases to be Placed on Docket*

Each case shall be placed on the docket as soon as the printing of the apostles is completed by the clerk.

RULE XV—*Briefs*

SEC. 1—Counsel for the appellant shall file with the clerk of this court, at least twenty days before the case is called for argument, ten copies of a printed brief, and shall at the same time serve two copies thereof on the proctors of record, or on the counsel engaged upon the opposite side. This brief shall contain in order here stated:

(1) A statement of the nature of the appeal, the court from which the appeal is taken, and a concise abstract or statement of the case, presenting succinctly the questions involved, and the manner in which they were raised.

(2) If the pleadings have been amended in this court or new proofs have been taken, it shall be stated what amendments have been made and in what respect the new proofs have changed, or tended to change, the case as made in the court below.

(3) A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the folios of the record or to the numbers of the questions, and the authorities relied upon in support of each point.

SEC. 2—The counsel for the appellee shall file with the clerk of the court ten printed copies of his brief and serve two copies thereof at least ten days before the case is called for argument. His brief shall be of a like character, with

that required of the appellant, and in case new proofs are taken on behalf of the appellee, the brief shall so state and wherein the new proofs have changed the case as made in the court below.

SEC. 3—The reasonable expense of printing briefs shall be an item of taxable costs.

RULE XVI—*Mandates*

The decrees of this court shall direct that a mandate issue to the court below.

RULE XVII—*Extension of Time*

The time specified in the foregoing rules for any proceeding may be extended by order of a judge of this court.

RULE XVIII—*When Rules of District Courts to Apply*

In all matters, in civil causes of admiralty and maritime jurisdiction, not expressly provided for by the foregoing rules of this court, the rules of practice of the District Court of the district in which the cause was decided, being in force at the time (not being inconsistent with these rules), will be adopted so far as may seem proper.

RULE XIX—*What General Rules Shall be Deemed Admiralty Rules*

The following of the General Rules of this court, and no others, shall be deemed Admiralty Rules, viz: Rules 3, 4, 5, 6, 7, 9, 11, 12; sec. 4 of Rule 14; Rules 15, 16, 17, 18, 19, 20, 21, 22, 23; sec. 5 of General Rule 24; Rules 25, 26, 27, 28, 29; sec. 4 of Rule 30; Rules 31, 32, 34, and 36.

In the *Ninth Circuit* the rules in admiralty are the same as in the Second Circuit, to and including Rule 8.

Rule 9 is as follows:

New Testimony—How Taken

Such testimony shall be taken by deposition before the clerk of this court, or any United States commissioner,

or any clerk of a District or Circuit Court of the United States, or any notary public upon reasonable notice, in writing, given to the opposite party or his attorney of record, either in this court or in the court below, which notice must state the name or names of the witness or witnesses and the time and place of taking his or their deposition or depositions; or by commission issued out of this court with interrogatories annexed. Upon sufficient cause shown, the court may grant an open commission.

Rules 10 and 11 are as in the Second Circuit.

Rule 12 reads as follows:

Extension of Time

The time specified in the foregoing rules for any proceeding may be extended by order of a judge of this court.

There are no other admiralty rules in the Ninth Circuit.

take and subscribe the following oath of office, which shall be filed with the clerk:

“I, ————, do solemnly swear [or affirm] that I will demean myself, as an attorney and counsellor of this court, uprightly and according to law, and that I will support the Constitution of the United States.”

RULE III—*Process*

Processes to be issued from this court shall be of such form and style as is in use in the Supreme Court of the United States. There shall also be a process to be issued to the Board of General Appraisers, which shall be called a mandate, and shall in terms direct the transmission to this court in proper cases of proceedings taken and had before said Board of General Appraisers. All writs shall be attested in the name of the presiding judge, shall be signed by the clerk of the court, with the seal of the court attached, and shall be made returnable 30 days from the date thereof; provided that the time fixed for the return of such record may be extended, upon application to the court, or a judge thereof, at chambers, and upon good cause shown, or the time may be extended by stipulation, which shall be made expressly subject to the future orders of the court.

RULE IV—*Review*

Any party feeling aggrieved at any decision of the Board of General Appraisers and who may be entitled, under the provisions of chapter 8 of the act entitled “An act to codify, revise, and amend the laws relating to the judiciary,” approved March 3, 1911, or any amendment thereof, to have a review of said decision, may, within the time fixed by said act or any amendment thereof, apply to this court for a review of the questions of law and fact included therein.

RULE V—*Assignment of Errors*

The party seeking a review of any appealable decision of the Board of General Appraisers shall file with the clerk,

in duplicate, a concise statement of the errors of law and fact complained of, and a copy of such statement shall be served on the collector or on the importer, owner, consignee, agent, or attorney, as the case may be, either by mail or by delivering the same personally to the party to be served or to his attorney, who shall have regularly appeared before said Board of General Appraisers on or before the date of such application. Such service, in case of mailing, shall be by depositing in a post office a copy of such statement in a sealed envelope plainly addressed to the party or attorney to be served at his place of business or residence, with postage thereon fully prepaid. In all cases where the United States is not the appellant such application for review shall be accompanied by the filing fee of \$6 and by a bond for costs in a sum not less than \$25.

RULE VI—*Mandate*

Upon the filing of such application for review, a mandate shall issue to said Board of General Appraisers directing said board to transmit to said court the records and evidence taken by them, together with a certified statement of the facts involved in the case and the decision thereon, together with all samples and exhibits used before them.

RULE VII—*Calendar*

All cases transmitted to this court, whether removed from the Board of General Appraisers in response to the mandate of this court or by the transfer from the United States Circuit Courts of Appeals, United States Circuit, Territorial, or District Courts, shall, upon receipt of the record by the clerk, be placed upon the calendar in the order in which they are received, and such cases shall stand for hearing and submission in that order without notice; provided, the hearing of any case may be postponed for good cause shown. On motion of either party, with due notice to the other side, the court may advance on the calendar cases that are of unusual importance, or whenever other considerations of public policy make such action appear desirable.

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RULE VIII—*Records and Briefs*

The appellant shall, within 14 days from the filing of such return, or within such further time as may be allowed by the court or a judge thereof at chambers, deposit with the clerk a sum sufficient to meet the cost of printing the record. As soon as the record is printed the clerk shall retain at least 15 copies for the use of the court and furnish not less than 10 copies to the appellant, who shall serve not less than 3 copies on the appellee or his counsel.

Within 14 days after the receipt of the printed record, appellant shall serve on the appellee or his counsel not less than 3 copies of his brief, and within 14 days thereafter the appellee shall serve not less than 3 printed copies of his brief with the appellant or his counsel. Both sides shall promptly file not less than 15 copies of their briefs with the clerk. Extension of the time for filing briefs for a period not exceeding 30 days may be made by stipulation, which shall become effective when filed with the clerk.

All records and briefs printed for the use of this court shall be in small-pica type, 24 pica ems to the line, 35 lines to a page, leaded with four-to-pica leads. All records and briefs shall have a suitable cover containing the title of the court and cause. Records shall be properly indexed and printed under the direction of the clerk of the court. The size of the pages of the records and briefs shall be 9¼ inches by 6⅛ inches.

RULE IX—*Sessions*

The court will convene during sessions at 10 A. M., and will continue its sessions until all cases on its calendar in readiness for hearing are disposed of. All motions shall be presented at the opening of court on Tuesdays, but when the court is in session for hearing causes they may be presented at the opening of court on any day of the session.

RULE X—*Appeals, when Taken*

The court shall be open for business on each business day of the year for the purpose of receiving applications for appeal, and on such days writs directed to the Board of

General Appraisers may issue as of course, attested in the name of the presiding judge and signed by the clerk or assistant clerk. In case of a vacancy in the office of the presiding judge, they may be attested in the name of the next judge in the order of precedence as acting presiding judge.

RULE XI—*Amendments—Judgments*

The court may, in furtherance of justice, permit amendments to processes or proceedings in any case, and on final hearing may affirm, reverse, or modify any ruling, decision, or conclusion of the Board of General Appraisers, or may reverse and remand for new trial or other appropriate proceeding.

RULE XII—*Final Decision—Mandate*

At the expiration of 30 days after decision by the court, the court shall issue its mandate to the Board of General Appraisers for such further proceedings as shall be proper to be taken in pursuance of such determination.

RULE XIII—*Fees*

The fees of the clerk of the court shall be \$6 in each case. No fee shall be exacted in cases on appeal to other Federal courts and transferred to this court for final determination. There shall be paid for each certificate of admission of an attorney to practice, \$1; and for making or copying any record or other paper and certifying the same, 15 cents per folio of 100 words. An amount sufficient to cover the cost of printing the record shall be deposited with the clerk on his demand, provided that when an appeal is taken by the United States no payment of fees shall be required. In all other cases fees shall be paid in advance.

The fees and costs to be allowed the marshal shall be, and hereby are, fixed the same as those allowed the marshal of the Supreme Court of the United States.

RULE XIV—*Arguments*

Arguments shall be limited to one hour on a side, and not more than two counsel on a side shall be heard in any case

except by special order of the court. The time for oral argument may be extended in the discretion of the court.

RULE XV—*Appearances*

It will not be necessary for the Assistant Attorney General in charge of customs cases to file a notice of appearance in this court or to serve such notice on opposing attorneys. Where the appellant is a protestant, if the petition for review is filed by a member of the bar of this court, no separate appearance as attorney will be required, but a notice of appearance shall be served on the Assistant Attorney General unless such appellant's attorney represented the importer before the Board of General Appraisers. Where the United States is the appellant the attorneys for the appellee shall file a notice of appearance in this court and serve a copy of such notice on the Assistant Attorney General.

RULE XVI—*Applications for Rehearing*

No application for rehearing will be considered by the court unless the moving party, at as early a date as may be practicable and within 30 days after decision unless further time be granted, shall cause any papers upon which it is based, together with his reasons for granting the same, to be printed and 12 copies thereof filed with the clerk of this court, together with proof that a copy thereof has been served upon counsel for the opposing party. The opposing party may at any time within 10 days thereafter file with the clerk of the court his objections to the granting of the application, serve a copy thereof upon the moving party, and the question shall thereupon be deemed submitted for decision.

RULES OF PRACTICE
FOR THE
COURTS OF EQUITY OF THE UNITED
STATES

Adopted in A. D. 1822

Under the authority given by the Act of May 8th, 1792, c. 137, sec. 2, the following rules were ordered by the Supreme Court, to be the Rules of Practice for the Courts of Equity of the United States.

RULE I

Rules shall be held monthly in the clerk's office on the first Monday in every month, for the purpose of entering all proceedings and orders, which may be entered at the rules, and which are not taken or made in open court. The rules shall be held under the direction of the clerk, but either of the judges of the court may make or allow any special orders in any cause, not inconsistent with the regulations herein prescribed, which shall be entered in the rule book, and take effect accordingly.

RULE II

All process shall be made returnable to the next succeeding term, or to any intermediate rule day, at the election of the party praying the same, and the return of the said process "executed" shall be effectual whereon to ground any subsequent proceedings. If the party be not found, a copy served by the person leaving the same shall be left with his wife, or any free white person who is a member of his or her family, at his or her dwelling house or usual place of abode, and the truth of the case shall be returned; and where such process shall not be executed, the clerk is directed to issue other

similar process, if the same be required by the party at whose instance the original process was sued out; and if upon such second process the party be not found, a copy shall be again left in like manner as is hereinbefore directed, and upon a second return that the party is not found, and that a copy has been left as herein directed, the same proceedings may be had as on process returned executed.

RULE III

Where any person, either plaintiff or defendant, in any suit, shall be dead, it shall be lawful for the clerk, during the recess of the court, upon application, to issue process to bring into court the representative of such deceased person.

RULE IV

The plaintiff shall file his bill before or at the time of taking out the subpoena.

RULE V

The plaintiff may amend his bill before the defendant or his attorney or solicitor hath taken out a copy thereof, or in a small matter afterwards, without paying costs; but if he amend in a material point after such copy obtained, he shall pay the defendant all costs occasioned thereby.

RULE VI

The day of appearance shall be the rule day after the process is returned executed, or after the second return of a copy left if the process shall not be executed, when the process is returnable to the rules, or the rule day next succeeding the term, where the process shall be returnable to a term of the court; and if the defendant shall not appear and file his answer within three months after the day of appearance, and after the bill shall have been filed, the plaintiff may proceed to take his bill for confessed and the matter thereof shall be decreed accordingly, which decree shall be absolute, unless cause be shown at the term next succeeding that to which the process shall be returned executed.

RULE VII

If the defendant cannot be found, it shall be sufficient service of any decree nisi, to leave a copy thereof with his wife or any free white person who is a member of his or her family; and if no such person be found, then it shall be sufficient service to publish the same in such paper of the district as may be designated by the court for such time as the court shall direct.

RULE VIII

All process shall be executed by a sworn officer or affidavit must be made of the service thereof, when executed by any other person.

RULE IX

Every defendant may swear to his answer before any justice or judge of the United States, or a commissioner or master, or other person appointed by the court, or judge of any court of a State or Territory, or a justice of the peace, or notary public of any State or Territory.

RULE X

If the defendant does not file his answer within three months after the subpoena be returned executed, or after a second return of a copy left having been made at least three months, the plaintiff may either proceed on his bill as confessed, or have a general commission to take depositions, or he may move the court for an attachment to bring in the defendant to answer interrogatories, at his election, and may proceed to a hearing in the two last cases as if the answer had been filed and the cause was at issue. *Provided*, that the court may, on cause shown, allow the answer to be filed, and grant a further day for such hearing. And when a party is in custody on such writ of attachment, he shall be detained in custody until he shall file his answer, or be discharged by order of the court or one of the judges thereof.

RULE XI

No special replication to an answer shall be filed but by leave of the court or one of the judges thereof, for cause

shown; and if any matter alleged in the answer shall make it necessary for the plaintiff to amend his bill, he may have leave to amend the same with or without costs at the discretion of the court.

RULE XII

When a cross-bill shall be exhibited, the defendant or defendants to the first bill shall answer thereto, before the defendant or defendants to the cross-bill shall be compelled to answer such cross-bill.

RULE XIII

The complainant shall put in the general replication, or file exceptions within two calendar months after the answer shall have been put in. If he fails so to do, the defendant may leave a rule to reply with the clerk of the court, which being expired, and no replication or exceptions filed, the suit may be dismissed with costs; but the court may, for cause, order the same to be retained on payment of costs.

RULE XIV

If the plaintiff's attorney or solicitor shall except against any answer as insufficient, he may file his exceptions, and leave a rule with the clerk to make a better answer within two calendar months; and if within that time the defendant shall put in a sufficient answer, the same shall be received without costs; but if any defendant insists on the sufficiency of his answer, or neglects or refuses to put in a sufficient answer, or shall put in another insufficient answer, the plaintiff may set down his exceptions to be argued at the next term; and after the expiration of that rule, or any second insufficient answer put in, no further or other answer shall be received but on payment of costs.

RULE XV

If upon argument the plaintiff's exceptions shall be overruled, or the defendant's answer adjudged insufficient, the plaintiff shall pay to the defendant, or the defendant to the plaintiff, such costs as shall be allowed by the court.

RULE XVI

Upon a second answer being adjudged insufficient costs shall be doubled by the court, and the defendant may be examined upon interrogatories, and committed until he or she answer them; or the plaintiff may move the court to take so much of his bill as is not answered for confessed, and may file his replication, obtain commissions, and proceed to hearing in the usual manner.

RULE XVII

Rules to plead, answer, reply, rejoin, or other proceedings, not before particularly mentioned, when necessary, shall be given from month to month with the clerk in his office, and shall be entered in a rule book for the information of all parties, attorneys, or solicitors concerned therein, and shall be considered as sufficient notice thereof.

RULE XVIII

The defendant may at any time before the bill is taken for confessed, or afterwards with the leave of the court, demur or plead to the whole bill, or part of it, and he may demur to part, plead to part, and answer as to the residue, but in any case in which the bill charges fraud or combination, a plea to such part must be accompanied with an answer fortifying the plea, and explicitly denying the fraud and combination, and the fact on which the charge is founded.

RULE XIX

The plaintiff may set down the demurrer or plea to be argued, or he may take issue on the plea. If upon an issue, the facts stated in the plea, be determined for the defendant, they shall avail him as far as in law and equity they ought to avail him.

RULE XX

If a plea or demurrer be overruled, no other plea or demurrer shall be thereafter received, but the defendant shall proceed to answer the plaintiff's bill; and if he fail to do so

within two calendar months, the same, or so much thereof as was covered by the plea or demurrer, may be taken for confessed, and the matter thereof be decreed accordingly.

RULE XXI

If the plaintiff shall not reply to, or set for hearing any plea or demurrer, before the second term of the court after filing the same, the bill may be dismissed with costs.

RULE XXII

Upon a plea or demurrer being argued and overruled, costs shall be paid as where an answer is adjudged insufficient; but if adjudged good, the defendant shall have his costs.

RULE XXIII

The defendant, instead of filing a formal demurrer or plea, may insist on any special matter in his answer, and have the same benefit thereof, as if he had pleaded the same matter or had demurred to the bill.

RULE XXIV

After any bill filed, and before the defendant hath answered, upon oath made that any of the plaintiff's witnesses are aged, infirm, or going out of the country, or that any one of them is a single witness to a material fact, the clerk may issue a commission for taking the examination of such witness or witnesses *de bene esse*, the party praying such commission giving reasonable notice to the adverse party of the time and place of taking such deposition.

RULE XXV

Testimony may be taken according to the Acts of Congress, or under a commission. Whenever a general commission shall be issued for taking depositions upon answer and replication, six months from the time of the replication shall be allowed the parties for taking their depositions; and either party at the expiration of the said six months may set the

cause for hearing, and no deposition taken after that time shall be read as evidence on the hearing, unless the same was taken by consent of parties, by special order of the court, or out of the district.

RULE XXVI

Commissions to take depositions may be executed by any person qualified to take testimony according to the laws of the State, or by any person or persons, not exceeding three, appointed or named in the commission by order of the court, or by any judge thereof in vacation. All testimony taken under a commission shall be taken on interrogatories and cross-interrogatories filed in the cause, unless the parties shall dispense therewith, which interrogatories shall be filed in the clerk's office ten days previous to a rule-day, after which the defendant shall be allowed five days to file his cross-interrogatories, unless he waives his right.

RULE XXVII

Orders for the admission of a guardian *ad litem*, to defend a suit, may be made either by the court or one of the judges thereof.

RULE XXVIII

Witnesses who live within the district may, upon due notice of the opposite party, be summoned to appear before the commissioners appointed to take testimony, or before a master or examiner appointed in any cause by subpoena in the usual form, which may be issued by the clerk in blank, and filled up by the party praying the same, or by the commissioners, master, or examiner, requiring the attendance of the witnesses at the time and place specified, who shall be allowed for attendance the same compensation as for attendance in court; and if any witness shall refuse to appear, or to give evidence, it shall be deemed a contempt of the court, which being certified to the clerk's office by the commissioners, master or examiner, an attachment may issue thereupon, by order of the court, or of any judge thereof, in the same manner as if the contempt were for not attending, or

for refusing to give testimony in the court. But nothing herein contained shall prevent the examination of witnesses *viva voce* when produced in open court.

RULE XXIX

When a matter is referred to a master to examine and report thereon, he shall assign a day and place therefor, and give reasonable notice thereof to the parties, or to the attorney or solicitor of such party as may not reside within the district, and if either party shall fail to attend at the time and place, the master may adjourn the examination of the matter to some future day, and give notice thereof to the parties, in which notice it shall be expressed that if the party fail again to appear, the master will proceed *ex parte*; and if after receiving such notice the party shall again fail to appear, the master may proceed to examine the matter to him referred, and to report the same to the court, that such proceedings may be had thereon as to the court shall seem equitable and right.

RULE XXX

The courts in their sittings may regulate all proceedings in the office, and may set aside any dismissions, and reinstate the suits on such terms as may appear equitable.

RULE XXXI

Every petition for a rehearing shall contain the special matter or cause on which such hearing is applied for, shall be signed by counsel, and the facts therein stated, if not apparent on the record, shall be verified by the oath of the party or some other person. No rehearing shall be granted after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the Supreme Court. But if no appeal lies, it may be admitted at any time before the end of the next term of the court.

RULE XXXII

The Circuit Courts may make further rules and regulations, not inconsistent with the rules hereby prescribed, in their discretion.

RULE XXXIII

In all the cases where rules prescribed by this court, or by the Circuit Court, do not apply, the practice of the Circuit Courts shall be regulated by the practice of the High Court of Chancery in England.

Ordered by the court, that the foregoing rules be the rules of practice for the Courts of Equity of the United States, from and after the first day of July next, and the clerk of the court is directed to have the same printed, and to transmit a printed copy thereof, duly certified, to the clerks of the several courts of the United States, and to each of the judges thereof.

RULES OF PRACTICE
FOR THE
COURTS OF EQUITY OF THE UNITED
STATES

Adopted March 2, 1842; 1 How. xiii *et seq.*

RULE I—*Court Always Open*

The Circuit Courts, as Courts of Equity, shall be deemed always open for the purpose of filing bills, answers, and other pleadings; for issuing and returning mesne and final process and commissions; and for making and directing all interlocutory motions, orders, rules, and other proceedings, preparatory to hearing of all causes upon their merits.

. Rule 1 in the revision promulgated November 4, 1912.

RULE II—*Clerk's Office*

The clerk's office shall be open, and the clerk shall be in attendance therein, on the first Monday of every month, for the purpose of receiving, entering, entertaining, and disposing of all motions, rules, orders, and other proceedings, which are grantable of course and applied for, or had by the parties or their solicitors, in all causes pending in equity, in pursuance of the rules hereby prescribed.

Substantially the same as Rule 2 in the revision promulgated November 4, 1912.

RULE III—*Orders, Rules, etc.*

Any judge of the Circuit Court, as well in vacation as in term, may, at chambers, or on the rule-days at the clerk's office, make and direct all such interlocutory orders, rules, and other proceedings, preparatory to the hearing of all causes upon their merits in the same manner and with the

same effect as the Circuit Court could make and direct the same in term, reasonable notice of the application therefor being first given to the adverse party, or his solicitor, to appear and show cause to the contrary, at the next rule-day thereafter, unless some other time is assigned by the judge for the hearing.

Made part of Rule 1 in the revision promulgated November 4, 1912.

RULE IV—*Motions, Rules, etc., Entered in Order Book*

All motions, rules, orders, and other proceedings, made and directed at chambers, or on rule-days at the clerk's office, whether special or of course, shall be entered by the clerk in an order-book, to be kept at the clerk's office, on the day when they are made and directed; which book shall be open at all office hours to the free inspection of the parties in any suit in equity, and their solicitors. And, except in cases where personal or other notice is specially required or directed, such entry in the order-book shall be deemed sufficient notice to the parties and their solicitors, without further service thereof, of all orders, rules, acts, notices, and other proceedings entered in such order-book, touching any and all the matters in the suits to and in which they are parties and solicitors. And notice to the solicitors shall be deemed notice to the parties for whom they appear and whom they represent, in all cases where personal notice on the parties is not otherwise specially required. Where the solicitors for all the parties in a suit reside in or near the same town or city, the judges of the Circuit Court may, by rule, abridge the time for notice of rules, orders, or other proceedings not requiring personal service on the parties, in their discretion.

Amended by Rule 4 in the revision promulgated November 4, 1912.

RULE V—*Motions for Process Grantable by Clerk*

All motions and applications in the clerk's office for the issuing of mesne process and final process to enforce and execute decrees; for filing bills, answers, pleas, demurrers, and other pleadings; for making amendments to bills and answers; for taking bills *pro confesso*; for filing exceptions; and for other proceedings in the clerk's office which do not, by the rules

hereinafter prescribed, require any allowance or order of the court or of any judge thereof, shall be deemed motions and applications grantable of course by the clerk of the court. But the same may be suspended, or altered, or rescinded by any judge of the court, upon special cause shown.

Substantially the same as Rule 5 in the revision promulgated November 4, 1912.

RULE VI—*Motions and Orders not Grantable as of Course*

All motions for rules or orders and other proceedings, which are not grantable of course or without notice, shall, unless a different time be assigned by a judge of the court, be made on a rule-day, and entered in the order-book, and shall be heard at the rule-day next after that on which the motion is made. And if the adverse party, or his solicitor, shall not then appear, or shall not show good cause against the same, the motion may be heard by any judge of the court *ex parte*, and granted, as if not objected to, or refused, in his discretion.

Amended by Rule 6 in the revision promulgated November 4, 1912.

RULE VII—*Compulsory Process*

The process of subpoena shall constitute the proper mesne process in all suits in equity, in the first instance, to require the defendant to appear and answer the exigency of the bill; and, unless otherwise provided in these rules, or specially ordered by the Circuit Court, a writ of attachment, and, if the defendant cannot be found, a writ of sequestration, or a writ of assistance to enforce a delivery of possession, as the case may require, shall be the proper process to issue for the purpose of compelling obedience to any interlocutory or final order or decree of the court.

Same as Rule 7 in the revision promulgated November 4, 1912

RULE VIII—*Final Process*

Final process to execute any decree may, if the decree be solely for the payment of money, be by a writ of execution, in the form used in the Circuit Court in suits at common law in actions of *assumpsit*. If the decree be for the performance of any specific act, as, for example, for the execution of a con-

veyance of land or the delivering up of deeds or other documents, the decree shall, in all cases, prescribe the time within which the act shall be done, of which the defendant shall be bound, without further service, to take notice; and upon affidavit of the plaintiff, filed in the clerk's office, that the same has not been complied with within the prescribed time, the clerk shall issue a writ of attachment against the delinquent party, from which, if attached thereon, he shall not be discharged, unless upon a full compliance with the decree and the payment of all costs, or upon a special order of the court, or of a judge thereof, upon motion and affidavit, enlarging the time for the performance thereof. If the delinquent party cannot be found, a writ of sequestration shall issue against his estate upon the return of *non est inventus*, to compel obedience to the decree.

Amended by Rule 8 in the revision promulgated November 4, 1912.

RULE IX—*Writ of Assistance*

When any decree or order is for the delivery or possession, upon proof made by affidavit of a demand and refusal to obey the decree or order, the party prosecuting the same shall be entitled to a writ of assistance from the clerk of the court.

Same as Rule 9 in the revision promulgated November 4, 1912.

RULE X—*Persons not Parties*

Every person, not being a party in any cause, who has obtained an order, or in whose favor an order shall have been made, shall be enabled to enforce obedience to such order by the same process as if he were a party to the cause; and every person, not being a party in any cause, against whom obedience to any order of the court may be enforced, shall be liable to the same process for enforcing obedience to such orders as if he were a party in the cause.

Made Rule 11 in the revision promulgated November 4, 1912.

RULE XI—*Subpoena*

No process of subpoena shall issue from the clerk's office in any suit in equity until the bill is filed in the office.

Part of Rule 12 in the revision promulgated November 4, 1912.

RULE XII—*Subpœna when Returnable*

Whenever a bill is filed, the clerk shall issue the process of subpoena thereon, as of course, upon the application of the plaintiff, which shall contain the Christian names as well as the surnames of the parties, and shall be returnable into the clerk's office the next rule-day, or the next rule-day but one, at the election of the plaintiff, occurring after twenty days from the time of the issuing thereof. At the bottom of the subpoena shall be placed a memorandum, that the defendant is to enter his appearance in the suit in the clerk's office on or before the day at which the writ is returnable; otherwise the bill may be taken *pro confesso*. Where there are more than one defendant, a writ of subpoena may, at the election of the plaintiff, be sued out separately for each defendant, except in the case of husband and wife defendants, or a joint subpoena against all the defendants.

Amended and made part of Rule 12 in the revision promulgated November 4, 1912.

RULE XIII—*Service of Subpœna*

The service of all subpoenas shall be by a delivery of a copy thereof by the officer serving the same to the defendant personally, or by leaving a copy thereof at the dwelling-house or usual place of abode of each defendant, with some adult person who is a member or resident in the family.

Same as Rule 13 in the revision promulgated November 4, 1912.

RULE XIV—*Alias Subpœna*

Whenever any subpoena shall be returned not executed as to any defendant, the plaintiff shall be entitled to another subpoena, *toties quoties*, against such defendant, if he shall require it, until due service is made.

Same as Rule 14 in the revision promulgated November 4, 1912.

RULE XV—*Who to Make Service*

The service of all process, mesne and final, shall be by the marshal of the district, or his deputy, or by some other person specially appointed by the court for that purpose, and not

otherwise. In the latter case, the person serving the process shall make affidavit thereof.

Same as Rule 15 in the revision promulgated November 4, 1912.

RULE XVI—*Suit Entered on Docket*

Upon the return of the subpoena as served and executed upon any defendant, the clerk shall enter the suit upon his docket as pending in the court, and shall state the time of the entry.

Made part of Rule 3 in the revision promulgated November 4, 1912

RULE XVII—*Appearance*

The appearance-day of the defendant shall be the rule-day to which the subpoena is made returnable, provided he has been served with the process twenty days before that day; otherwise his appearance-day shall be the next rule-day succeeding the rule-day when the process is returnable.

The appearance of the defendant, either personally or by his solicitor, shall be entered in the order-book on the day thereof by the clerk.

Amended and made part of Rule 16 in the revision promulgated November 4, 1912.

RULE XVIII—*Bills Taken Pro Confesso*

It shall be the duty of the defendant, unless the time shall be otherwise enlarged, for cause shown, by a judge of the court, upon motion for that purpose, to file his plea, demurrer, or answer to the bill, in the clerk's office, on the rule-day next succeeding that of entering his appearance. In default thereof, the plaintiff may, at his election, enter an order (as of course) in the order-book, that the bill be taken *pro confesso*; and thereupon the cause shall be proceeded in *ex parte*, and the matter of the bill may be decreed by the court at any time after the expiration of thirty days from and after the entry of said order, if the same can be done without an answer, and is proper to be decreed; or the plaintiff, if he requires any discovery or answer to enable him to obtain a proper decree, shall be entitled to process of attachment

against the defendant to compel an answer, and the defendant shall not, when arrested upon such process, be discharged therefrom, unless upon filing his answer, or otherwise complying with such order as the court or a judge thereof may direct as to pleading to or fully answering the bill, within a period to be fixed by the court or judge, and undertaking to speed the cause.

Covered by Rule 16 in the revision promulgated November 4, 1912.

RULE XIX—*Decree on Default*

When the bill is taken *pro confesso* the court may proceed to a decree at any time after the expiration of thirty days from and after the entry of the order to take the bill *pro confesso*, and such decree rendered shall be deemed absolute, unless the court shall, at the same term, set aside the same, or enlarge the time for filing the answer, upon cause shown upon motion and affidavit of the defendant. And no such motion shall be granted, unless upon the payment of the costs of the plaintiff in the suit up to that time, or such part thereof as the court shall deem reasonable, and unless the defendant shall undertake to file his answer within such time as the court shall direct, and submit to such other terms as the court shall direct, for the purpose of speeding the cause.

Made Rule 17 in the revision promulgated November 4, 1912.

RULE XX—*Frame of Bills*

Every bill, in the introductory part thereof, shall contain the names, places of abode, and citizenship of all the parties, plaintiffs and defendants, by and against whom the bill is brought. The form, in substance, shall be as follows: "To the judges of the Circuit Court of the United States for the district of —: A. B., of —, and a citizen of the State of —, brings this his bill against C. D., of —, and a citizen of the State of —, and E. F., of —, and a citizen of the State of —. And thereupon your orator complains and says that," &c.

Amended and made Rule 25 in the revision promulgated November 4, 1912.

RULE XXI—*What Bill may Omit and What State*

The plaintiff, in his bill, shall be at liberty to omit, at his option, the part which is usually called the common confederacy clause of the bill, averring a confederacy between the defendants to injure or defraud the plaintiff; also what is commonly called the charging part of the bill, setting forth the matters or excuses which the defendant is supposed to intend to set up by way of defense to the bill; also what is commonly called the jurisdiction clause of the bill, that the acts complained of are contrary to equity, and that the defendant is without any remedy at law; and the bill shall not be demurrable therefor. And the plaintiff may, in the narrative or stating part of his bill, state and avoid, by counter-averments, at his option, any matter or thing which he supposes will be insisted upon by the defendant by way of defense or excuse to the case made by the plaintiff for relief. The prayer of the bill shall ask the special relief to which the plaintiff supposes himself entitled, and also shall contain a prayer for general relief; and if an injunction, or a writ of *ne exeat regno*, or any other special order, pending the suit, is required, it shall also be specially asked for.

Covered by Rule 25 in the revision promulgated November 4, 1912.

RULE XXII—*Parties out of Jurisdiction*

If any persons, other than those named as defendants in the bill, shall appear to be necessary or proper parties thereto, the bill shall aver the reason why they are not made parties, by showing them to be without the jurisdiction of the court, or that they cannot be joined without ousting the jurisdiction of the court as to the other parties. And as to persons who are without the jurisdiction and may properly be made parties, the bill may pray that process may issue to make them parties to the bill if they should come within the jurisdiction.

Covered by Rule 25 in the revision promulgated November 4, 1912.

RULE XXIII—*Prayer for Process*

The prayer for process of subpoena in the bill shall contain the names of all the defendants named in the introductory

part of the bill, and if any of them are known to be infants under age, or otherwise under guardianship, shall state the fact, so that the court may take order thereon, as justice may require upon the return of the process. If an injunction, or a writ of *ne exeat regno*, or any other special order, pending the suit, is asked for in the prayer for relief, that shall be sufficient, without repeating the same in the prayer for process.

Abrogated by the revision promulgated November 4, 1912.

RULE XXIV—*Signature of Counsel to Bill*

Every bill shall contain the signature of counsel annexed to it, which shall be considered as an affirmation on his part that, upon the instructions given to him and the case laid before him, there is good ground for the suit, in the manner in which it is framed.

Amended and made Rule 24 in the revision promulgated November 4, 1912.

RULE XXV—*Limitation of Taxable Costs*

In order to prevent unnecessary costs and expenses, and to promote brevity, succinctness, and directness in the allegations of bills and answers, the regular taxable costs for every bill and answer shall in no case exceed the sum which is allowed in the State court of chancery in the district, if any there be; but if there be none, then it shall not exceed the sum of three dollars for every bill or answer.

Abrogated by the revision promulgated November 4, 1912.

RULE XXVI—*Scandal and Impertinence in Bills*

Every bill shall be expressed in as brief and succinct terms as it reasonably can be, and shall contain no unnecessary recitals of deeds, documents, contracts, or other instruments, in *hæc verba*, or any other impertinent matter, or any scandalous matter not relevant to the suit. If it does, it may, on exceptions, be referred to a master, by any judge of the court, for impertinence or scandal; and if so found by him, the matter shall be expunged at the expense of the plaintiff, and he shall pay to the defendant all his costs in the suit up to that time, unless the court or a judge thereof shall otherwise order.

If the master shall report that the bill is not scandalous or impertinent, the plaintiff shall be entitled to all costs occasioned by the reference.

Abrogated by Rules 21 and 81 in the revision promulgated November 4, 1912.

RULE XXVII—*Exceptions for Scandal and Impertinence*

No order shall be made by any judge for referring any bill, answer, or pleading, or other matter or proceeding, depending before the court, for scandal or impertinence, unless exceptions are taken in writing and signed by counsel, describing the particular passages which are considered to be scandalous or impertinent; nor unless the exceptions shall be filed on or before the next rule-day after the process on the bill shall be returnable, or after the answer or pleading is filed. And such order, when obtained, shall be considered as abandoned, unless the party obtaining the order shall, without any unnecessary delay, procure the master to examine and report for the same on or before the next succeeding rule-day, or the master shall certify that further time is necessary for him to complete the examination.

Abrogated by Rules 21 and 81 in the revision promulgated November 4, 1912.

RULE XXVIII—*Amendment of Bills*

The plaintiff shall be at liberty, as a matter of course, and without payment of costs, to amend his bill, in any matters whatsoever, before any copy has been taken out of the clerk's office, and in any small matters afterwards, such as filing blanks, correcting errors of dates, misnomer of parties, misdescription of premises, clerical errors, and generally in matters of form. But if he amend in a material point (as he may do of course) after a copy has been so taken, before any answer or plea or demurrer to the bill, he shall pay to the defendant the costs occasioned thereby, and shall, without delay, furnish him a fair copy thereof, free of expense, with suitable references to the places where the same are to be inserted. And if the amendments are numerous, he shall furnish, in like manner, to the defendant, a copy of the whole

bill as amended; and if there be more than one defendant, a copy shall be furnished to each defendant affected thereby.

Amended and made Rule 28 in the revision promulgated November 4, 1912.

RULE XXIX—*Amendments by Order of Court*

After an answer, or plea, or demurrer is put in, and before replication, the plaintiff may, upon motion or petition, without notice, obtain an order from any judge of the court to amend his bill on or before the next succeeding rule-day, upon payment of costs or without payment of costs, as the court or a judge thereof may in his discretion direct. But after replication filed, the plaintiff shall not be permitted to withdraw it and to amend his bill, except upon a special order of a judge of the court, upon motion or petition, after due notice to the other party, and upon proof by affidavit that the same is not made for the purpose of vexation or delay, or that the matter of the proposed amendment is material, and could not with reasonable diligence have been sooner introduced into the bill, and upon the plaintiff's submitting to such other terms as may be imposed by the judge for speeding the cause.

Amended and made Rule 28 in the revision promulgated November 4, 1912.

RULE XXX—*When Order Deemed Abandoned*

If the plaintiff so obtaining any order to amend his bill after answer, or plea, or demurrer, or after replication, shall not file his amendments or amended bill, as the case may require, in the clerk's office on or before the next succeeding rule-day, he shall be considered to have abandoned the same, and the cause shall proceed as if no application for any amendment had been made.

Abrogated by the revision promulgated November 4, 1912.

RULE XXXI—*Demurrers and Pleas*

No demurrer or plea shall be allowed to be filed to any bill, unless upon a certificate of counsel, that in his opinion it is well founded in point of law, and supported by the affidavit

of the defendant; that it is not interposed for delay; and, if a plea, that it is true in point of fact.

Abrogated by the revision promulgated November 4, 1912.

RULE XXXII—*May Demur to Part, Plead to Part and Answer to Part*

The defendant may at any time before the bill is taken for confessed, or afterward with the leave of the court, demur or plead to the whole bill, or to part of it, and he may demur to part, plead to part, and answer as to the residue; but in every case in which the bill specially charges fraud or combination, a plea to such part must be accompanied with an answer fortifying the plea and explicitly denying the fraud and combination, and the facts on which the charge is founded.

Abrogated by the revision promulgated November 4, 1912.

RULE XXXIII—*Argument on Plea*

The plaintiff may set down the demurrer or plea to be argued, or he may take issue on the plea. If, upon an issue, the facts stated in the plea be determined for the defendant, they shall avail him as far as in law and equity they ought to avail him.

Abrogated by the revision promulgated November 4, 1912.

RULE XXXIV—*Costs on Demurrer Overruled*

If, upon the hearing, any demurrer or plea is overruled, the plaintiff shall be entitled to his costs in the cause up to that period unless the court shall be satisfied that the defendant had good ground, in point of law or fact, to interpose the same, and it was not interposed vexatiously or for delay. And, upon the overruling of any plea or demurrer, the defendant shall be assigned to answer the bill, or so much thereof as is covered by the plea or demurrer, the next succeeding rule-day, or at such other period as, consistently with justice and the rights of the defendant, the same can, in the judgment of the court, be reasonably done; in default whereof, the bill shall be taken against him *pro confesso*, and the matter thereof proceeded in and decreed accordingly.

Abrogated by the revision promulgated November 4, 1912.

RULE XXXV—*Costs on Demurrer Allowed*

If, upon the hearing, any demurrer or plea shall be allowed, the defendant shall be entitled to his costs. But the court may, in its discretion, upon motion of the plaintiff, allow him to amend his bill, upon such terms as it shall deem reasonable.

Abrogated by the revision promulgated November 4, 1912.

RULE XXXVI—*Demurrer, Sufficiency of*

No demurrer or plea shall be held bad and overruled upon argument, only because such demurrer or plea shall not cover so much of the bill as it might by law have extended to.

Abrogated by the revision promulgated November 4, 1912.

RULE XXXVII—*Demurrer to Part of Matter Answered or Met by Plea*

No demurrer or plea shall be held bad and overruled upon argument, only because the answer of the defendant may extend to some part of the same matter as may be covered by such demurrer or plea.

Abrogated by the revision promulgated November 4, 1912.

RULE XXXVIII—*Failure to Reply or Set Down Plea or Demurrer*

If the plaintiff shall not reply to any plea, or set down any plea or demurrer for argument on the rule-day when the same is filed, or on the next succeeding rule-day, he shall be deemed to admit the truth and sufficiency thereof, and his bill shall be dismissed as of course, unless a judge of the court shall allow him further time for that purpose.

Abrogated by the revision promulgated November 4, 1912.

RULE XXXIX—*Answers*

The rule, that if a defendant submits to answer he shall answer fully to all the matters of the bill, shall no longer apply in cases where he might by plea protect himself from such answer and discovery. And the defendant shall be entitled in all cases by answer to insist upon all matters of defense (not

being matters of abatement, or to the character of the parties, or matters of form) in bar of or to the merits of the bill, of which he may be entitled to avail himself by a plea in bar; and in such answer he shall not be compellable to answer any other matters than he would be compellable to answer and discover upon filing a plea in bar and an answer in support of such plea, touching the matters set forth in the bill to avoid or repel the bar or defense. Thus, for example, a *bona fide* purchaser, for a valuable consideration without notice, may set up that defense by way of answer instead of plea, and shall be entitled to the same protection, and shall not be compellable to make any further answer or discovery of his title than he would be in any answer in support of such plea.

Covered by Rule 30 in the revision promulgated November 4, 1912.

RULE XL—*When Defendant not Bound to Answer Charge of Bill*

A defendant shall not be bound to answer any statement or charge in the bill, unless specially and particularly interrogated thereto; and a defendant shall not be bound to answer any interrogatory in the bill, except those interrogatories which such defendant is required to answer; and where a defendant shall answer any statement or charge in the bill to which he is not interrogated, only by stating his ignorance of the matter so stated or charged, such answer shall be deemed impertinent.

Covered by Rule 30 in the revision promulgated November 4, 1912.

DECEMBER TERM, 1850

Ordered, That the fortieth rule, heretofore adopted and promulgated by this court as one of the rules of practice in suits in equity in the Circuit Courts, be, and the same is hereby, repealed and annulled. And it shall not hereafter be necessary to interrogate a defendant specially and particularly upon any statement in the bill, unless the complainant desires to do so, to obtain a discovery.

Covered by Rules 30 and 58 in the revision promulgated November 4, 1912.

RULE XLI—*Interrogatories to be Numbered*

The interrogatories contained in the interrogating part of the bill shall be divided as conveniently as may be from each other and numbered consecutively 1, 2, 3, etc.; and the interrogatories which each defendant is required to answer shall be specified in a note at the foot of the bill, in the form or to the effect following, that is to say: "The defendant (A. B.) is required to answer the interrogatories numbered respectively 1, 2, 3," etc., and the office copy of the bill taken by each defendant shall not contain any interrogatories except those which such defendant is so required to answer, unless such defendant shall require to be furnished with a copy of the whole bill.

Covered by Rule 58 in the revision promulgated November 4, 1912

DECEMBER TERM, 1871***Amendment to 41st Equity Rule***

If the complainant, in his bill, shall waive an answer under oath, or shall only require an answer under oath with regard to certain specified interrogatories, the answer of the defendant, though under oath, except such part thereof as shall be directly responsive to such interrogatories, shall not be evidence in his favor, unless the cause be set down for hearing on bill and answer only; but may nevertheless be used as an affidavit, with the same effect as heretofore, on a motion to grant or dissolve an injunction, or on any other incidental motion in the cause; but this shall not prevent a defendant from becoming a witness in his own behalf under sec. 3 of the Act of Congress of July 2, 1864.

Promulgated May 6, 1872, 13 Wall. IX. Abrogated by the revision promulgated November 4, 1912.

RULE XLII—*Specifying Interrogatories*

The note at the foot of the bill, specifying the interrogatories which each defendant is required to answer, shall be considered and treated as part of the bill, and the addition of any such note to the bill, or any alteration in or addition

to such note, after the bill is filed, shall be considered and treated as an amendment of the bill.

Abrogated by the revision promulgated November 4, 1912.

RULE XLIII—*Form of Bill Preceding Interrogating Part*

Instead of the words of the bill now in use, preceding the interrogating part thereof, and beginning with the words "To the end therefore," there shall hereafter be used words in the form or to the effect following: "To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answers make to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written they are respectively required to answer; that is to say—

"1. Whether, &c.

"2. Whether, &c."

Abrogated by the revision promulgated November 4, 1912.

RULE XLIV—*What Interrogatories Need not be Answered*

A defendant shall be at liberty, by answer, to decline answering any interrogatory, or part of an interrogatory, from answering which he might have protected himself by demurrer; and he shall be at liberty so to decline, notwithstanding he shall answer other parts of the bill from which he might have protected himself by demurrer.

Abrogated by the revision promulgated November 4, 1912.

RULE XLV—*No Special Replication*

No special replication to any answer shall be filed. But if any matter alleged in the answer shall make it necessary for the plaintiff to amend his bill, he may have leave to amend the same with or without the payment of costs, as the court, or a judge thereof, may in his discretion direct.

Abrogated by the revision promulgated November 4, 1912.

RULE XLVI—*New or Supplemental Answer*

In every case where an amendment shall be made after answer filed, the defendant shall put in a new or supplemental answer on or before the next succeeding rule-day after that on which the amendment or amended bill is filed, unless the time is enlarged or otherwise ordered by a judge of the court; and upon his default, the like proceedings may be had as in cases of an omission to put in an answer.

Same as Rule 32 in the revision promulgated November 4, 1912.

RULE XLVII—*Parties to Bills*

In all cases where it shall appear to the court that persons, who might otherwise be deemed necessary or proper parties to the suit, cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may, in its discretion, proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties.

Same as Rule 39 in the revision promulgated November 4, 1912.

RULE XLVIII—*When Parties Numerous.*

Where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interest of the plaintiffs and the defendants in the suit properly before it. But, in such cases, the decree shall be without prejudice to the rights and claims of all the absent parties.

Abrogated by the revision promulgated November 4, 1912.

RULE XLIX—*Trustees, etc., as Parties*

In all suits concerning real estate which is vested in trustees by devise, and such trustees are competent to sell and give discharges for the proceeds of the sale, and for the rents and

profits of the estate, such trustees shall represent the persons beneficially interested in the estate, or the proceeds, or the rents and profits, in the same manner and to the same extent as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate; and in such cases it shall not be necessary to make the persons beneficially interested in such real estates, or rents and profits, parties to the suit; but the court may, upon consideration of the matter on the hearing, if it shall so think fit, order such persons to be made parties.

Covered by Rule 37 in the revision promulgated November 4, 1912.

RULE L—*When Heir at Law not Necessary Party*

In suits to execute the trusts of a will, it shall not be necessary to make the heir at law a party; but the plaintiffs shall be at liberty to make the heir at law a party where he desires to have the will established against him.

Same as Rule 41 in the revision promulgated November 4, 1912.

RULE LI—*Joint and Several Debtors*

In all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the court as parties to a suit concerning such demand all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable.

Same as Rule 42 in the revision promulgated November 4, 1912.

RULE LII—*Answer Suggesting Defect of Want of Parties*

Where the defendant shall, by his answer, suggest that the bill is defective for want of parties, the plaintiff shall be at liberty, within fourteen days after answer filed, to set down the cause for argument upon that objection only; and the purpose for which the same is so set down shall be notified by an entry, to be made in the clerk's order-book, in the form or to the effect following (that is to say): "Set down upon the defendant's objection for want of parties." And where the plaintiff shall not so set down his cause, but shall proceed

therewith to a hearing, notwithstanding an objection for want of parties taken by the answer, he shall not, at the hearing of the cause, if the defendant's objection shall then be allowed be entitled as of course to an order for liberty to amend his bill by adding parties. But the court, if it thinks fit, shall be at liberty to dismiss the bill.

Amended and made Rule 43 in the revision promulgated November 4, 1912.

RULE LIII—*Defect of Parties Suggested at Hearing*

If a defendant shall, at the hearing of a cause, object that a suit is defective for want of parties not having by plea or answer taken the objection, and therein specified by name or description of parties to whom the objection applies, the court (if it shall think fit) shall be at liberty to make a decree saving the rights of the absent parties.

Same as Rule 44 in the revision promulgated November 4, 1912.

RULE LIV—*Nominal Parties to Bills*

Where no account, payment, conveyance, or other direct relief is sought against a party to a suit, not being an infant, the party, upon service of the subpoena upon him, need not appear and answer the bill, unless the plaintiff specially requires him so to do by the prayer of his bill; but he may appear and answer at his option; and if he does not appear and answer he shall be bound by all the proceedings in the cause. If the plaintiff shall require him to appear and answer he shall be entitled to the costs of all the proceedings against him unless the court shall otherwise direct.

Same as Rule 40 in the revision promulgated November 4, 1912

RULE LV—*Injunctions*

Whenever an injunction is asked for by the bill to stay proceedings at law, if the defendant do not enter his appearance and plead, demur, or answer to the same within the time prescribed therefor by these rules, the plaintiff shall be entitled as of course, upon motion, without notice, to such injunction. But special injunctions shall be grantable only upon due notice to the other party by the court in term, or by a judge

thereof in vacation, after a hearing, which may be *ex parte*, if the adverse party does not appear at the time and place ordered. In every case where an injunction—either the common injunction or a special injunction—is awarded in vacation, it shall, unless previously dissolved by the judge granting the same, continue until the next term of the court, or until it is dissolved by some other order of the court.

Covered by Rule 73 in the revision promulgated November 4, 1912.

RULE LVI—*Bills of Revivor and Supplemental Bills*

Whenever a suit in equity shall become abated by the death of either party, or by any other event, the same may be revived by a bill of revivor or a bill in the nature of a bill of revivor, as the circumstances of the case may require, filed by the proper parties entitled to revive the same, which bill may be filed in the clerk's office at any time; and, upon suggestion of the facts, the proper process of subpoena shall, as of course, be issued by the clerk, requiring the proper representatives of the other party to appear and show cause, if any they have, why the cause should not be revived. And if no cause shall be shown at the next rule-day which shall occur after fourteen days from the time of the service of the same process, the suit shall stand revived, as of course.

Amended and made Rule 45 in the revision promulgated November 4, 1912.

RULE LVII—*Supplemental Bill*

Whenever any suit in equity shall become defective from any event happening after the filing of the bill (as, for example, by change of interest in the parties), or for any other reason a supplemental bill, or a bill in the nature of a supplemental bill, may be necessary to be filed in the cause, leave to file the same may be granted by any judge of the court on any rule-day upon proper cause shown and due notice to the other party. And if leave is granted to file such supplemental bill, the defendant shall demur, plead, or answer thereto on the next succeeding rule-day after the supplemental bill is filed in the clerk's office, unless some other time shall be assigned by a judge of the court.

Covered by Rule 34 in the revision promulgated November 4, 1912.

RULE LVIII—*Omissions Allowed*

It shall not be necessary in any bill of revivor or supplemental bill to set forth any of the statements in the original suit, unless the special circumstances of the case may require it.

Same as Rule 35 in the revision promulgated November 4, 1912.

RULE LIX—*Answers*

Every defendant may swear to his answer before any justice or judge of any court of the United States, or before any commissioner appointed by any Circuit Court to take testimony or depositions, or before any master in chancery appointed by any Circuit Court, or before any judge of any court of a State or Territory, or before any notary public.

Covered by Rule 36 in the revision promulgated November 4, 1912.

RULE LX—*Amendment of Answers*

After an answer is put in, it may be amended, as of course, in any matter of form, or by filling up a blank, or correcting a date, or reference to a document, or other small matter, and be resworn, at any time before a replication is put in, or the cause is set down for a hearing upon bill and answer. But after replication, or such setting down for a hearing, it shall not be amended in any material matters, as by adding new facts or defenses, or qualifying or altering the original statements, except by special leave of the court, or of a judge thereof, upon motion and cause shown, after due notice to the adverse party, supported, if required, by affidavit; and in every case where leave is so granted, the court or the judge granting the same may, in his discretion, require that the same be separately engrossed, and added as a distinct amendment to the original answer, so as to be distinguishable therefrom.

Covered by Rules 19 and 30 in the revision promulgated November 4, 1912.

RULE LXI—*Exceptions to Answers*

After an answer is filed on any rule-day, the plaintiff shall be allowed until the next succeeding rule-day to file in the

clerk's office exceptions thereto for insufficiency, and no longer, unless a longer time shall be allowed for the purpose, upon cause shown to the court, or a judge thereof; and, if no exception shall be filed thereto within that period, the answer shall be deemed and taken to be sufficient.

Abrogated by Rules 33 and 81 in the revision promulgated November 4, 1912.

RULE LXII—*Costs on Separate Answers*

When the same solicitor is employed for two or more defendants, and separate answers shall be filed, or other proceedings had, by two or more of the defendants separately, costs shall not be allowed for such separate answers, or other proceedings, unless a master, upon reference to him, shall certify that such separate answers and other proceedings were necessary or proper, and ought not to have been joined together.

Abrogated by the revision promulgated November 4, 1912.

RULE LXIII—*Exceptions for Insufficiency*

Where exceptions shall be filed to the answer for insufficiency, within the period prescribed by these rules, if the defendant shall not submit to the same and file an amended answer on the next succeeding rule-day, the plaintiff shall forthwith set them down for a hearing on the next succeeding rule-day thereafter, before a judge of the court, and shall enter, as of course, in the order-book, an order for that purpose; and if he shall not so set down the same for a hearing, the exceptions shall be deemed abandoned, and the answer shall be deemed sufficient; provided, however, that the court, or any judge thereof, may, for good cause shown, enlarge the time for filing exceptions, or for answering the same, in his discretion, upon such terms as he may deem reasonable.

Abrogated by the revision promulgated November 4, 1912.

RULE LXIV—*Answer After Exceptions Allowed*

If, at the hearing, the exceptions shall be allowed, the defendant shall be bound to put in a full and complete answer thereto on the next succeeding rule-day; otherwise the

plaintiff shall, as of course, be entitled to take the bill, so far as the matter of such exceptions is concerned, as confessed, or, at his election, he may have a writ of attachment to compel the defendant to make a better answer to the matter of the exceptions; and the defendant, when he is in custody upon such writ, shall not be discharged therefrom but by an order of the court, or of a judge thereof, upon his putting in such answer, and complying with such other terms as the court or judge may direct.

Abrogated by the revision promulgated November 4, 1912.

RULE LXV—*Costs on Exceptions Overruled*

If, upon argument, the plaintiff's exceptions to the answer shall be overruled, or the answer shall be adjudged insufficient, the prevailing party shall be entitled to all the costs occasioned thereby, unless otherwise directed by the court, or the judge thereof, at the hearing upon the exceptions.

Abrogated by the revision promulgated November 4, 1912.

RULE LXVI—*Replication and Issue*

Whenever the answer of the defendant shall not be excepted to, or shall be adjudged or deemed sufficient, the plaintiff shall file the general replication thereto on or before the next succeeding rule-day thereafter; and in all cases where the general replication is filed, the cause shall be deemed, to all intents and purposes, at issue, without any rejoinder or other pleading on either side. If the plaintiff shall omit or refuse to file such replication within the prescribed period, the defendant shall be entitled to an order, as of course, for a dismissal of the suit; and the suit shall thereupon stand dismissed, unless the court, or a judge thereof, shall, upon motion, for cause shown, allow a replication to be filed *nunc pro tunc*, the plaintiff submitting to speed the cause, and to such other terms as may be directed.

Abrogated by Rules 31 and 81 in the revision promulgated November 4, 1912.

RULE LXVII—*Testimony—How Taken*

(1) After the cause is at issue, commissions to take testimony may be taken out in vacation as well as in term,

jointly by both parties, or severally by either party, upon interrogatories filed by the party taking out the same in the clerk's office, ten days' notice thereof being given to the adverse party to file cross-interrogatories before the issuing of the commission; and if no cross-interrogatories are filed at the expiration of the time the commission may issue *ex parte*. In all cases the commissioner or commissioners may be named by the court or by a judge thereof; and the presiding judge of the court exercising jurisdiction may, either in term time or in vacation, vest in the clerk of the court general power to name commissioners to take testimony.

(2) Either party may give notice to the other that he desires the evidence to be adduced in the cause to be taken orally, and thereupon all the witnesses to be examined shall be examined before one of the examiners of the court, or before an examiner to be specially appointed by the court. The examiner, if he so request, shall be furnished with a copy of the pleadings.

Such examination shall take place in the presence of the parties or their agents, by their counsel or solicitors, and the witnesses shall be subject to cross-examination and re-examination, all of which shall be conducted as near as may be in the mode now used in common-law courts.

The depositions taken upon such oral examination shall be reduced to writing by the examiner, in the form of question put and answer given; provided, that, by consent of parties, the examiner may take down the testimony of any witness in the form of narrative.

At the request of either party, with reasonable notice, the deposition of any witness shall, under the direction of the examiner, be taken down either by a skillful stenographer or by a skillful typewriter, as the examiner may elect, and when taken stenographically shall be put into typewriting or other writing; provided, that such stenographer or typewriter has been appointed by the court, or is approved by both parties.

The testimony of each witness, after such reduction to writing, shall be read over to him and signed by him in the presence of the examiner and of such of the parties or counsel as may attend; provided, that if the witness shall refuse to

sign his deposition so taken, then the examiner shall sign the same, stating upon the record the reasons, if any, assigned by the witness for such refusal.

The examiner may, upon all examinations, state any special matters to the court as he shall think fit; and any question or questions which may be objected to shall be noted by the examiner upon the deposition, but he shall not have power to decide on the competency, materiality, or relevancy of the questions; and the court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just.

(3) In case of refusal of witnesses to attend, to be sworn, or to answer any question put by the examiner, or by counsel or solicitor, the same practice shall be adopted as is now practiced with respect to witnesses to be produced on examination before an examiner of said court on written interrogatories.

(4) Notice shall be given by the respective counsel or solicitors to the opposite counsel or solicitors, or parties, of the time and place of the examination, for such reasonable time as the examiner may fix by order in each cause.

(5) When the examination of witnesses before the examiner is concluded, the original depositions, authenticated by the signature of the examiner, shall be transmitted by him to the clerk of the court, to be there filed of record, in the same mode as prescribed in sec. 865 of the Revised Statutes.

(6) Testimony may be taken on commission in the usual way, by written interrogatories and cross-interrogatories, on motion to the court in term time, or to a judge in vacation, for special reasons, satisfactory to the court or judge.

(7) Where the evidence to be adduced in a cause is to be taken orally, as before provided, the court may, on motion of either party, assign a time within which the complainant shall take his evidence in support of the bill, and a time thereafter within which the defendant shall take his evidence in defense, and a time thereafter within which the complainant shall take his evidence in reply; and no further evidence shall be taken in the cause, unless by agreement of the parties or by leave of court first obtained, on motion for cause shown.

(8) The expense of the taking down of depositions by a

stenographer and of putting them into typewriting or other writing shall be paid in the first instance by the party calling the witness, and shall be imposed by the court, as part of the costs, upon such party as the court shall adjudge should ultimately bear them.

(9) Upon due notice given as prescribed by previous order, the court may, at its discretion, permit the whole, or any specific part, of the evidence to be adduced orally in open court on final hearing.

Second, third, fourth, fifth and sixth paragraphs promulgated December Term, 1861, 1 *Black.* 6, amended October Term, 1890, 139 *U. S.* 707.

Seventh paragraph promulgated December Term, 1869, 9 *Wall.* VII.

Eighth paragraph and the amended 67th Rule promulgated May 2, 1892, 144 *U. S.* 689.

Ninth paragraph promulgated May 15, 1893, 149 *U. S.* 792.

Abrogated by the revision promulgated November 4, 1912.

RULE LXVIII—*Testimony by Deposition*

Testimony may also be taken in the cause, after it is at issue, by deposition, according to the act of Congress. But in such case, if no notice is given to the adverse party of the time and place of taking the deposition, he shall, upon motion and affidavit of the fact, be entitled to a cross-examination of the witness, either under a commission or by a new deposition taken under the acts of Congress, if a court or judge thereof shall, under all the circumstances, deem it reasonable.

Amended and made Rule 54 in the revision promulgated November 4, 1912.

RULE LXIX—*Time Allowed for Taking Testimony*

Three months, and no more, shall be allowed for the taking of testimony after the cause is at issue, unless the court, or a judge thereof, shall, upon special cause shown by either party, enlarge the time; and no testimony taken after such period shall be allowed to be read in evidence at the hearing. Immediately upon the return of the commissions and depositions containing the testimony into the clerk's office, publication thereof may be ordered in the clerk's office, by any judge of the court, upon due notice to the parties, or it may be enlarged, as he may deem reasonable, under all the circumstances; but, by consent of the parties, publication of the testimony may at any time pass into the clerk's office,

such consent being in writing, and a copy thereof entered in the order-books, or indorsed upon the deposition or testimony.

Covered by Rules 47, 55 and 56 in the revision promulgated November 4, 1912.

RULE LXX—*Testimony De Bene Esse*

After any bill filed and before the defendant hath answered the same, upon affidavit made that any of the plaintiff's witnesses are aged and infirm, or going out of the country, or that any one of them is a single witness to a material fact, the clerk of the court shall, as of course, upon the application of the plaintiff, issue a commission to such commissioner or commissioners as a judge of the court may direct, to take the examination of such witness or witnesses *de bene esse*, upon giving due notice to the adverse party of the time and place of taking his testimony.

Covered by Rules 47 and 54 in the revision promulgated November 4, 1912.

RULE LXXI—*Form of the Last Interrogatory*

The last interrogatory in the written interrogatories to take testimony now commonly in use shall in the future be altered, and stated in substance thus: "Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer."

Abrogated by the revision promulgated November 4, 1912.

RULE LXXII—*Cross-Bill*

Where a defendant in equity files a cross-bill for discovery only against the plaintiff in the original bill, the defendant to the original bill shall first answer thereto before the original plaintiff shall be compellable to answer the cross-bill. The answer of the original plaintiff to such cross-bill may be read and used by the party filing the cross-bill at the hearing, in the same manner and under the same restrictions as the answer praying relief may now be read and used.

Covered by Rule 58 in the revision promulgated November 4, 1912.

RULE LXXIII—*Reference to and Proceedings Before Masters*

Every decree for an account of the personal estate of a testator or intestate shall contain a direction to the master to whom it is referred to take the same to inquire and state to the court what parts, if any, of such personal estate are outstanding or undisposed of, unless the court shall otherwise direct.

Abrogated by the revision promulgated November 4, 1912.

RULE LXXIV—*Reference, Duty of Master*

Whenever any reference of any matter is made to a master to examine and report thereon, the party at whose instance or for whose benefit the reference is made shall cause the same to be presented to the master for a hearing on or before the next rule-day succeeding the time when the reference was made; if he shall omit to do so, the adverse party shall be at liberty forthwith to cause proceedings to be had before the master, at the costs of the party procuring the reference.

Amended and made Rule 59 in the revision promulgated November 4, 1912.

RULE LXXV—*Time and Notice*

Upon every such reference, it shall be the duty of the master, as soon as he reasonably can after the same is brought before him, to assign a time and place for proceedings in the same, and to give due notice thereof to each of the parties, or their solicitors; and if either party shall fail to appear at the time and place appointed, the master shall be at liberty to proceed *ex parte*, or, in his discretion, to adjourn the examination and proceedings to a future day, giving notice to the absent party or his solicitor of such adjournment; and it shall be the duty of the master to proceed with all reasonable diligence in every such reference, and with the least practicable delay, and either party shall be at liberty to apply to the court, or a judge thereof, for an order to the master to speed the proceedings and to make his report, and to certify to the court or judge the reason for any delay.

Same as Rule 60 in the revision promulgated November 4, 1912.

RULE LXXVI—*Master's Report*

In the reports made by the master to the court, no part of any state of facts, charge, affidavit, deposition, examination, or answer brought in or used before them shall be stated or recited. But such state of facts, charge, affidavit, deposition, examination, or answer shall be identified, specified, and referred to, so as to inform the court what state of facts, charge, affidavit, deposition, examination, or answer were so brought in or used.

Same as Rule 61 in the revision promulgated November 4, 1912.

RULE LXXVII—*Proceeding Before Master*

The master shall regulate all the proceedings in every hearing before him, upon every such reference; and he shall have full authority to examine the parties in the cause, upon oath, touching all matters contained in the reference; and also to require the production of all books, papers, writings, vouchers, and other documents applicable thereto; and also to examine on oath, *viva voce*, all witnesses produced by the parties before him, and to order the examination of other witnesses to be taken, under a commission to be issued upon his certificate from the clerk's office or by deposition, according to the act of Congress, or otherwise, as hereinafter provided; and also to direct the mode in which the matters requiring evidence shall be proved before him; and generally to do all other acts, and direct all other inquiries and proceedings in the matters before him, which he may deem necessary and proper to the justice and merits thereof and the rights of the parties.

Amended and made Rule 62 in the revision promulgated November 4, 1912.

RULE LXXVIII—*Witnesses*

Witnesses who live within the district may, upon due notice to the opposite party, be summoned to appear before the commissioner appointed to take testimony, or before a master or examiner appointed in any cause, by subpoena in the usual form, which may be issued by the clerk in blank, and filed up by the party praying the same, or by the com-

missioner, master, or examiner, requiring the attendance of the witnesses at the time and place specified, who shall be allowed for attendance the same compensation as for attendance in court; and if any witness shall refuse to appear or give evidence it shall be deemed a contempt of the court, which being certified to the clerk's office by the commissioner, master, or examiner, an attachment may issue thereupon by order of the court or of any judge thereof, in the same manner as if the contempt were for not attending, or for refusing to give testimony in the court. But nothing herein contained shall prevent the examination of witnesses *viva voce* when produced in open court, if the court shall, in its discretion, deem it advisable.

Amended and made Rule 52 in the revision promulgated November 4, 1912.

RULE LXXIX—*Accounts and Accounting*

All parties accounting before a master shall bring in their respective accounts in the form of debtor and creditor; and any of the other parties who shall not be satisfied with the account so brought in shall be at liberty to examine the accounting party *viva voce*, or upon interrogatories, in the master's office, or by deposition, as the master shall direct.

Same as Rule 63 in the revision promulgated November 4, 1912.

RULE LXXX—*Affidavits, etc., Before Master*

All affidavits, depositions, and documents which have been previously made, read, or used in the court upon any proceeding in any cause or matter may be used before the master.

Same as Rule 64 in the revision promulgated November 4, 1912.

RULE LXXXI—*Examination of Creditor*

The master shall be at liberty to examine any creditor or other person coming in to claim before him, either upon written interrogatories or *viva voce*, or in both modes, as the nature of the case may appear to him to require. The evidence upon such examinations shall be taken down by the master, or by some other person by his order and in his

presence, if either party requires it, in order that the same may be used by the court if necessary.

Same as Rule 65 in the revision promulgated November 4, 1912.

RULE LXXXII—*Appointment of Masters*

The Circuit Courts may appoint standing masters in chancery in their respective districts (a majority of all the judges thereof, including the justice of the Supreme Court, the circuit judges, and the district judge for the district, concurring in the appointment), and they may also appoint a master *pro hac vice* in any particular case. The compensation to be allowed to every master in chancery for his services in any particular case shall be fixed by the Circuit Court, in its discretion, having regard to all the circumstances thereof, and the compensation shall be charged upon and borne by such of the parties in the cause as the court shall direct. The master shall not retain his report as security for his compensation; but when the compensation is allowed by the court, he shall be entitled to an attachment for the amount against the party who is ordered to pay the same, if, upon notice thereof, he does not pay it within the time prescribed by the court.

Amended and made Rule 68 in the revision promulgated November 4, 1912.

RULE LXXXIII—*Exceptions to Report of Master*

The master, as soon as his report is ready, shall return the same into the clerk's office, and the day of the return shall be entered by the clerk in the order-book. The parties shall have one month from the time of filing the report to file exceptions thereto; and, if no exceptions are within that period filed by either party, the report shall stand confirmed on the next rule-day after the month is expired. If exceptions are filed, they shall stand for hearing before the court, if the court is then in session; or, if not, then at the next sitting of the court which shall be held thereafter, by adjournment or otherwise.

Amended and made Rule 66 in the revision promulgated November 4, 1912.

RULE LXXXIV—*Costs on Exceptions*

And, in order to prevent exceptions to reports from being filed for frivolous causes, or for mere delay, the party whose exceptions are overruled shall, for every exception overruled, pay costs to the other party, and for every exception allowed shall be entitled to costs; the cost to be fixed in each case by the court, by a standing rule of the Circuit Court.

Amended and made Rule 67 in the revision promulgated November 4, 1912.

RULE LXXXV—*Decrees*

Clerical mistakes in decrees or decretal orders, or errors arising from any accidental slip or omission, may, at any time before an actual enrollment thereof, be corrected by order of the court or a judge thereof, upon petition, without the form or expense of a rehearing.

Amended and made Rule 72 in the revision promulgated November 4, 1912.

RULE LXXXVI—*Decrees not to Contain Pleadings*

In drawing up decrees and orders, neither the bill, nor answer, nor other pleadings, nor any part thereof, nor the report of any master, nor any other prior proceeding, shall be recited or stated in the decree or order; but the decree and order shall begin, in substance, as follows: "This cause came on to be heard (or to be further heard, as the case may be) at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz:" [Here insert the decree or order.]

Same as Rule 71 in the revision promulgated November 4, 1912.

RULE LXXXVII—*Guardians and Prochein Amis*

Guardians *ad litem* to defend a suit may be appointed by the court, or by any judge thereof, for infants or other persons who are under guardianship, or otherwise incapable to sue for themselves. All infants and other persons so incapable may sue by their guardians, if any, or by their *prochein ami*; subject, however, to such orders as the court may direct for the protection of infants and other persons.

Amended and made Rule 70 in the revision promulgated November 4, 1912.

RULE LXXXVIII—*Rehearings*

Every petition for a rehearing shall contain the special matter or cause on which such rehearing is applied for, shall be signed by counsel, and the facts therein stated, if not apparent on the record, shall be verified by the oath of the party or by some other person. No hearing shall be granted after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the Supreme Court. But if no appeal lies, the petition may be admitted at any time before the end of the next term of the court, in the discretion of the court.

Amended and made Rule 69 in the revision promulgated November 4, 1912.

RULE LXXXIX—*Circuit Courts may Make Rules*

The Circuit Courts (a majority of all the judges thereof, including the justice of the Supreme Court, the circuit judges, and the district judge for the district, concurring therein) may make any other and further rules and regulations for the practice, proceedings, and process, mesne and final, in their respective districts, not inconsistent with the rules hereby prescribed, in their discretion, and from time to time alter and amend the same.

Amended and made Rule 79 in the revision promulgated November 4, 1912.

RULE XC—*Practice when Rules do not Apply*

In all cases where the rules prescribed by this court or by the Circuit Court do not apply, the practice of the Circuit Court shall be regulated by the present practice of the high court of chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and local conveniences of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice.

Abrogated by the revision promulgated November 4, 1912.

RULE XCI—*Affirmation*

Whenever, under these rules, an oath is or may be required to be taken, the party may, if conscientiously scrupulous of

taking an oath, in lieu thereof make solemn affirmation to the truth of the facts stated by him.

Same as Rule 78 in the revision promulgated November 4, 1912.

DECEMBER TERM, 1863

RULE XCII—*Balance in Foreclosure Suits*

Ordered, That in suits in equity for the foreclosure of mortgages in the Circuit Courts of the United States, or in any court of the Territories having jurisdiction of the same, a decree may be rendered for any balance that may be found due to the complainant over and above the proceeds of the sale or sales, and execution may issue for the collection of the same, as is provided in the eighth rule of this court regulating the equity practice, where the decree is solely for the payment of money.

Promulgated April 18, 1864, 1 *Wall.* VII, after the decision in *Orchard v. Hughes*, 1 *Wall.* 77. See *Noonan v. Bradley*, 67 *U. S.* 499.

Amended and made Rule 10 in the revision promulgated November 4, 1912.

OCTOBER TERM, 1878

RULE XCIII—*Injunctions*

When an appeal from a final decree, in an equity suit, granting or dissolving an injunction, is allowed by a justice or judge who took part in the decision of the cause, he may, in his discretion, at the time of such allowance, make an order suspending or modifying the injunction during the pendency of the appeal, upon such terms, as to bond or otherwise, as he may consider proper for the security of the rights of the opposite party.

Promulgated January 13, 1879, 97 *U. S.* VII.

Amended and made Rule 74 in the revision promulgated November 4, 1912.

OCTOBER TERM, 1881

RULE XCIV—*Bill by Stockholder against Corporation*

Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation,

must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action.

Promulgated January 23, 1882, 104 U. S. IX.

Amended and made Rule 27 in the revision promulgated November 4, 1912.

ACTS OF CONGRESS

PERTAINING TO THE

JURISDICTION OF THE DISTRICT COURTS

Sec. 291 of the Judicial Code, Act approved March 3, 1911, 36 *Stat.*, ch. 231, reads as follows:

"Sec. 291: Whenever in any law not embraced within this Act, any reference is made to, or any power or duty is conferred or imposed upon the Circuit Courts, such reference shall upon the taking effect of this Act, be deemed and held to refer to, and to confer such power and impose such duty upon the District Courts."

Sec. 968, *Rev. Stats. (U. S. Comp. Stats. 1901, p. 702)* prescribes:

"When, in a Circuit Court, plaintiff in an action at law, originally brought there, or a petitioner in equity, other than the United States recovers less than the sum or value of five hundred dollars, exclusive of costs, in a case which cannot be brought there unless the amount in dispute, exclusive of costs, exceeds said sum or value; or a libellant, upon his own appeal recovers less than the sum or value of three hundred dollars, exclusive of costs, he shall not be allowed, but, at the discretion of the court, may be adjudged to pay costs." Act of Sept. 24, 1789, as amended March 3, 1803, c. 40, sec. 2, 2 *Stat.* 244.

The sum or value of \$500 was the limit of jurisdiction of the Circuit Courts when the act was passed. It was increased to \$2,000 by the Act of March 3, 1887, c. 373, sec. 2.

AUTHORITIES UPON THE JURISDICTION OF FEDERAL COURTS

An action for a tort given by statute of one State may be enforced in the Federal court of another State. The Circuit (District) Courts of the United States are vested with general jurisdiction of civil actions involving the requisite pecuniary value between citizens of different States. *Interior Construction Co. v. Gibney*, 160 *U. S.* 217-219, 40 *L. ed.* 401.

In a cause brought in New York under a New Jersey statute giving a right of action for death caused by negligence, the court says: "Whenever, by either the common law or the statute law of a State a right of action has become fixed and a legal liability incurred, that liability

may be enforced and the right of action pursued in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties. *Held*, the action being in the nature of a trespass to the person, was transitory and not local and the venue immaterial. *Dennick v. Railroad Co.*, 103 *U. S.* 11-18, 26 L. ed. 439.

A decree *in personam* rendered upon service by publication against a person who is not a citizen or resident of the State in which rendered is not a bar to an action in the United States courts upon the same cause of action. Such a judgment will be allowed no force in the courts of another State, and it is of no greater force as against a citizen of another State in a court of the United States, though held within the State in which the judgment was rendered. *Hart v. Sanson*, 110 *U. S.* 151-156, 28 L. ed. 101.

This country adopted the equitable jurisdiction of the High Court of Chancery of England when the Constitution was framed and it is the jurisdiction exercised by the Federal courts to the present time, saving such modifications as it has undergone through usage and by Acts of Congress and in practice, through the rules adopted by the Supreme Court. *McConihay v. Wright*, 121 *U. S.* 201-206, 30 L. ed. 932.

The equity jurisdiction of the Federal courts is subject to neither limitation nor restraint by State legislation, and is uniform throughout the different States of the Union. *Payne v. Hook*, 7 *Wall.* 425-430, 19 L. ed. 260.

In a suit by a minor through his guardian, the jurisdiction of the court is determined by the citizenship of the minor and not that of the guardian. *Toledo Traction Co. v. Cameron*, 137 *Fed. R.* 48-52, 69 *C. C. A.* 28.

A Federal court has jurisdiction of an action by a non-resident against a local administrator and the sureties of a deceased guardian alleging fraud of the guardian, and praying an accounting. *Newberry v. Wilkinson*, 199 *Fed. R.* 673, 118 *C. C. A.* 111-118.

The probate administration laws of a State are not merely rules of practice for the courts, but laws limiting the rights of parties, to be observed by the Federal courts in the enforcement of individual rights. *Yonley v. Lavender*, 21 *Wall.* 276, 22 L. ed. 536.

So far as the administration laws of a State attempt to compel citizens of other States to establish demands against the estate of decedents only by proceedings in the probate court of the State, they are ineffectual. *Security Trust Co. v. Black River N. Bk.*, 187 *U. S.* 211-231, 47 L. ed. 147.

The courts of the United States when exercising jurisdiction over executors and administrators of the estates of decedents within a State are administering the laws of that State, and are bound by the same rules which govern the local tribunals. *Ib.*, p. 237. See *Aspden v. Nexon*, 4 *How.* 467, 11 L. ed. 1059.

The Federal courts have concurrent jurisdiction with the courts of the States to hear and adjudicate claims against the estates of deceased persons, between citizens of different States notwithstanding the fact that the States have by their legislation conferred exclusive jurisdiction to adjudge such claims upon a probate or other State court. *Schurmeier v. Connecticut Mutual Life Ins. Co.*, 137 *Fed. R.* 42-44, 69 *C. C. A.* 22.

A claim so adjudicated and established against an estate by a Federal court must take its place and share in the estate as administered by the State probate court, and cannot be enforced by process directly against the property of the decedent. A distributee, a citizen of another State, may, in the Federal court, establish his right to share in the estate, and enforce such adjudication against the administrator personally, or his sureties, or against any other parties subject to liability, or in any other way which does not disturb the possession of the property by the State court. *Byers v. McAuley*, 149 *U. S.* 608-620, 37 L. ed. 867.

A non-resident creditor may get judgment in a Federal court against a resident administrator but must come in on the estate for payment according to the law of the State. Because he has obtained judgment in the Federal court he cannot issue execution and take precedence of other creditors who have no right to sue in the Federal courts. If he do issue execution out of the Federal court and sell lands the sale is void. *Yonley v. Lavender*, 21 *Wall.* 276.

The Federal courts being controlled by the local laws respecting the administration of estates, their jurisdiction in so far as it is exercised, is necessarily concurrent with the probate jurisdiction of the several States, and being concurrent, it follows that the orders and judgments of such probate courts in the due and orderly administration of such estates are conclusive and binding on the Federal courts. *Newberry v. Wilkinson*, 199 *Fed. R.* 673, 118 *C. C. A.* 111-118.

Where on bill filed in the Federal court attacking a sale made under order of the probate court, and praying that deeds made thereunder be declared void and for other relief, an objection that the Federal court was without jurisdiction to make a decree setting aside and vacating the orders of the probate court, *Held*, if the objection went only to the power of the Federal court to act directly upon the probate court to compel it

to set aside its orders the position would be well taken, but that the Federal court was bound to give relief according to the general rules of equity the plaintiff being a non-resident, the defendant a resident, and the amount in controversy being over the jurisdictional sum. *Arrow-smith v. Gleason*, 129 *U. S.* 86-98, 32 *L. ed.* 630.

Wherever by the law obtaining in a State, customary or statutory suits in equity may be maintained in the courts of such State to set aside the probate of a will, similar suits may be maintained by original process in Federal courts where the requisite diverse citizenship and other requisite conditions exist. *Carrau v. O'Calligan*, 125 *Fed. R.* 657-663, 60 *C. C. A.* 347.

The general rule established both in England and in this country is that a court of equity will not entertain jurisdiction of a bill to set aside a will or the probate thereof. *Broderick's Will*, 21 *Wall.* 503-509, 22 *L. ed.* 599.

The State law authorizing an injunction to restrain an illegal tax levy does not authorize the issuance of an injunction by a Federal court, but if some recognized ground of equity jurisdiction, aside from the mere fact that an injunction is sought, be set up in the bill as incidental to the jurisdiction thus shown, the Federal court may enforce an equitable right or remedy given by a State statute. *Illinois Life Ins. Co. v. Newman*, 141 *Fed. R.* 449-454.

Federal courts of equity have no jurisdiction solely for the purpose of granting an injunction. *Ib.* 454.

The fact that a suit prosecuted in a State court, in addition to the enforcement of other matters within the jurisdiction of the State court, seeks the appointment of a receiver of property already in the hands of a receiver appointed by a Federal court, does not authorize the Federal court to enjoin the prosecution of the entire suit in the State court, where such prosecution in no way interferes with the possession of the *res* in the hands of the receiver, or infringes upon any rights, or jurisdiction of the Federal court. *Guarantee Trust Co. v. N. Chicago St. R. Co.*, 130 *Fed. R.* 801-813, 65 *C. C. A.* 65.

Sec. 720, *Rev. Stats.* (*U. S. Comp. Stats.* 1901, p. 581), must be construed to harmonize with other Federal statutes and the Constitution. If the Federal court has jurisdiction of a case by reason of the citizenship or alienage of the parties or otherwise, it can grant relief against the judgment of a State court obtained by fraud or other equitable grounds, in any case in which relief could be granted if the judgment was rendered by a United States court, and in such case a preliminary injunction may be issued against the defendants to prevent the collection of the judg-

ment by execution or otherwise. *Lehman v. Graham*, 135 *Fed. R.* 39-42, 67 *C. C. A.* 517.

Where a plaintiff brought suit in the State court which was removed upon petition of defendant into the Federal court, and then the plaintiff procured an order of the Federal court dismissing his suit without prejudice to his right to reinstitute the same, and thereafter instituted a new suit in the State court, reducing his demand to a sum below that necessary to give the Federal court jurisdiction, *Held*, that under sec. 720, *Rev. Stats. (U. S. Comp. Stats. 1901, p. 581)*, the Federal court was prohibited from granting an injunction to stay proceedings in the State court. *Texas Cotton Produce Co. v. Starnes*, 128 *Fed. R.* 183-184.

Where a settler on unsurveyed public lands intending to acquire them under the homestead laws brings a bill to protect his possessory rights under the laws of the United States, *Held*, there being no averment of diversity of citizenship of the parties, and no provision of any Federal statute presented for construction, and the court not being called upon to construe the Federal Constitution the trial court was without jurisdiction. *Earhart v. Switzler*, 179 *Fed. R.* 832, 105 *C. C. A.* 260.

Where no diversity of citizenship was alleged in a bill brought to enjoin another from interfering with the possession of the complainant taken under a subsisting, uncanceled homestead entry, and the bill did not allege that the defendant had possession under any claim of right, under the land laws of the United States, *Held*, the District Court was without jurisdiction, and an allegation in the bill that if possession were restored to him on cancellation of his homestead rights he could sell out his valuable improvements did not present a Federal question, such right to sell improvements held by a settler depending on no Federal statute. *Hare v. Birkenfield*, 181 *Fed. R.* 825, 104 *C. C. A.* 335.

A change of citizenship may be made instantaneously and although this change is made with a view to acquire among other things the right to sue in a Federal court, if the change is in fact made, and with the intention to permanently remain in the new domicil and become thenceforward a citizen of that State, such intent will not defeat the jurisdiction. Such a change is within the lawful rights of the citizens of the several States and such an object makes it neither unlawful nor wrongful. *Weemes v. Louisville Water Co.*, 130 *Fed. R.* 244.

Where the evidence shows that the property was transferred to the plaintiff, a non-resident of the district, for the purpose of bringing the suit, but it appears that the nominal parties are the real parties, and are the *bona fide* owners, and not merely holding it for the sole and only purpose of enabling them to bring suit in the United States court,

the court will not refuse to take jurisdiction. *Cole v. Philadelphia & Erie R. Co.*, 140 *Fed. R.* 944-946.

The privilege of a grantee or a purchaser of property, being a citizen of one of the States, to invoke the jurisdiction of the Federal court for the protection of his rights as against a citizen of another State, cannot be affected or impaired merely because of the motives that induced his grantor to convey, or his vendor to sell and deliver, the property, provided the sale or conveyance was *bona fide*, without the grantor or vendor reserving, or having any right or power to compel or require a reconveyance or a return to him of the property in question. *Lehigh Mining & Mfg. Co. v. Kelly*, 160 *U. S.* 327-336, 40 *L. ed.* 444.

The fact that as to certain persons and in certain transactions, persons who have proceeded under a general incorporation law to organize a corporation are a corporation *de facto*, is not enough to confer upon such persons a legal existence as a corporation so as to maintain an action in the Federal courts. *Gastonia Cotton Mfg. Co. v. W. L. Wells Co.*, 128 *Fed. R.* 369-373, 63 *C. C. A.* 111.

To entitle a party to removal from a State court under sec. 2 of the Act of 1875 (the same as the second clause in the Act of 1887, sec. 28, Judicial Code), there must exist in the suit a separate and distinct cause of action, in respect to which all the necessary parties on one side are citizens of different States than those on the other. When two or more causes of action are united in one suit there can be removal of the whole suit on the petition of one or more of the plaintiffs or defendants (now only the defendants) interested in the controversy, which if it had been sued on alone would be removable. *Geer v. Mathieson Alkali Works*, 190 *U. S.* 428-432, 47 *L. ed.* 1125.

Separate and distinct causes of action disclosed by the record in a single suit, upon either of which a separate suit could have been maintained, and the determination of neither of which is essential to the disposition of the other, constitute separate controversies, within the meaning of the acts of Congress. *Boatman's Bank v. Fritslen*, 135 *Fed. R.* 650, 68 *C. C. A.* 288.

Where the only rational inference from the pleadings and the record is that an improper party or a sham cause of action has been injected into a suit for the sole purpose of defeating the jurisdiction of the Federal court over the real controversy, pleading and evidence to that effect *aliunde* are neither indispensable or necessary; the court has the power and the duty to find from the record alone the attempted fraud and to prevent its perpetration. In a determination of the jurisdiction of the Federal courts and the right to remove causes of action to them, the court will consider only indispensable parties, because all other

parties may be dismissed and disregarded if their presence would oust or restrict the jurisdiction or the right. *Ib.* 658.

Where two or more causes of action are joined in one suit, to entitle any of the parties to a removal, the case must be one capable of separation into parts, so that in one of the parts the controversy would be presented with citizens of one or more States on one side, and citizens of other States on the other, which can be fully determined without the presence of any of the other parties to the suit as begun. *Fraser v. Genesen*, 106 *U. S.* 191-194, 27 *L. ed.* 131.

The position assigned to parties in a suit by a pleader are immaterial in determining whether a cause may be removed from a State court. It is the duty of a Federal court to ascertain the real matter in dispute and to arrange the parties on opposite sides of it according to the facts of their respective interests, and then to determine whether or not a controversy exists between citizens of different States which invokes the jurisdiction of that court. *Evers v. Watson*, 156 *U. S.* 527-532, 39 *L. ed.* 520.

Action was brought in the State court by the plaintiff, a citizen of another State, against the defendant, also a citizen of a State other than that in which the suit was brought, who filed a petition and bond and secured removal of the cause into the United States court on the ground of diversity of citizenship; the plaintiff then moved to remand to the State court because neither of the parties were residents or citizens of the State in which the suit was brought. *Held*, that the privilege given the defendant as to the place of suit by the Act of Aug. 13, 1888, providing that when jurisdiction is founded on diverse citizenship, suits shall be brought only in the district of the residence of the plaintiff or defendant may be waived; that the Circuit (District) Courts have jurisdiction over controversies between citizens of different States where neither plaintiff nor defendant resides in the district in which the court is held. *Burch v. Southern Pacific Co.*, 139 *Fed. R.* 350, decided June 24, 1905.

NOTE. The opinion in this case states that the question has never been directly passed upon by the Supreme Court of the United States, but the learned judge was in error, as on May 16, 1902, it was announced by that court that an original suit between citizens of different States, where the jurisdiction is founded only on diversity of citizenship, must be brought in the State in which one is a citizen, and in the district therein of which he is an inhabitant and resident. *Shaw v. Quincy Min. Co.*, 145 *U. S.* 444-449, 36 *L. ed.* 768.

To come within the provisions of sec. 8 of the Act of Mar. 3, 1875 (sec. 57, Judicial Code), allowing non-resident defendants to be brought

in by publication, the suit must really be one *in rem*, directed primarily against specific property for the purpose of enforcing a legal or equitable lien upon, or claim to such property, or removing an encumbrance or lien or cloud upon the title to such property, located within the district. *Jones v. Gould*, 141 *Fed. R.* 698-700.

The stock of a corporation organized under the laws of a State has its *situs* in that State within the meaning of sec. 8 of the Act of Mar. 3, 1875 (sec. 57, Judicial Code). *Ib.*

The lien mentioned in the act means a lien or title existing anterior to the suit, and not one caused by the suit itself. *Dormitzer v. Illinois, etc., Bridge Co.*, 6 *Fed. R.* 217-218.

A promissory note held by a defendant residing in the State where suit is brought is personal property within the meaning of the Act of Mar. 3, 1875, c. 137, sec. 8 (sec. 57, Judicial Code), in a suit in equity brought to enjoin prosecution of an action at law on the note and have the same cancelled and delivered up to complainant. *Manning v. Burdan*, 132 *Fed. R.* 382-386.

Such a suit is not ancillary so as to give the court jurisdiction over a non-resident corporation, one of the defendants in the equity suit, but not a party to the action at law. *Ib.* 385.

Where the Circuit Court has jurisdiction over the parties to a suit for the winding up of a corporation in which suit a receiver is appointed, any suit by or against such receiver for the collection of the assets or the defense of the property rights of such corporation is ancillary to the main suit and as such cognizable in the Federal courts, regardless either of the citizenship of the parties or the amount in controversy. *White v. Ewing*, 159 *U. S.* 36-39, 40 L. ed. 67.

Where the suit is ancillary to a suit of which the Federal court has properly taken jurisdiction the court does not look either to the citizenship of the parties to the ancillary suit nor to any other peculiar matter affecting its jurisdiction. It may be a case altogether devoid of the requirements necessary to give jurisdiction to an original bill. *Pope v. Louisville & N. R. R. Co.*, 173 *U. S.* 573, 43 L. ed. 814.

A suit in equity dependent upon a former suit of which the Federal court has jurisdiction, may be maintained in the absence of a Federal question and of diversity of citizenship. (1) To aid, enjoin, or regulate the original suit. (2) To restrain, avoid, explain, or enforce the judgment or decree therein. (3) To enforce or obtain an adjudication of liens upon, or claims to, property in the custody of the court in the original suit. In all these cases the suit is but a continuation of the

original suit. *Campbell v. Golden Cycle Min. Co.*, 141 *Fed. R.* 610-612, 73 *C. C. A.* 260.

In the Federal court, when any of the record shows upon its face that there is a controversy as to a jurisdictional fact, the court must require proof to support a finding that it has jurisdiction, or else assume that it does not have jurisdiction. *Klenk v. Byrne*, 143 *Fed. R.* 1009.

The presumption is that the case is without the jurisdiction of the court, unless the contrary affirmatively appears, and such presumption must be controlling when the pleadings make an issue as to any fact essential to the jurisdiction, and there is no evidence to sustain the affirmative allegation of such fact. *Oregon R. & Nav. Co. v. Shell*, 143 *Fed. R.* 1004-1006.

The use of the word "controversies" as in contradistinction to the word "cases" and the omission of the word "all" in respect of controversies, in sec. 1 of art. 3 of the Constitution, left it to Congress to define the controversies over which the courts it was empowered to ordain and establish might exercise jurisdiction, and the manner in which it was to be done. *Stevenson v. Fain*, 195 *U. S.* 165, 49 *L. ed.* 143.

Jurisdiction of the Federal courts as to the subject-matter may be limited by Congress in various ways, as to civil and criminal cases, cases at common law or in equity or in admiralty, probate cases, or cases under special statutes, to particular classes of persons, to proceedings in particular modes, and so on. In many cases jurisdiction may depend on the ascertainment of facts involving the merits, and in that sense the court exercises jurisdiction in disposing of the preliminary inquiry, although the result may be that it finds that it cannot go farther. And where the court erroneously retains jurisdiction to adjudicate the merits, its action can be corrected on review. *Louisville Trust Company v. Cominger*, 184 *U. S.* 18, 46 *L. ed.* 416.

A corporation incorporated in one State only, and having a usual place of business in another State, cannot be sued in a Circuit (District) Court of the United States held in the latter State by a citizen of a different State. *Shaw v. Quincy Mining Co.*, 145 *U. S.* 444-449, 36 *L. ed.* 768.

A corporation by doing business or appointing a general agent in a district other than that in which it is created does not waive its right, if reasonably availed of, to insist that a suit should have been brought in the latter district. *Southern Pacific Co. v. Denton*, 146 *U. S.* 202, 36 *L. ed.* 942.

A special appearance for the purpose of objecting to the jurisdiction,

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and upon such objection being overruled, an answer to the merits will constitute a waiver of the want of jurisdiction for want of requisite citizenship. *Ib.* 206.

Where a corporation is incorporated in a State embracing more than one district it cannot be deemed an inhabitant of any district other than that in which are its principal offices. *Galveston, etc., R. Co. v. Gonzales*, 151 *U. S.* 496.

An alien must resort to the domicile of the defendant to sue. *Ib.*

An alien, or a foreign corporation, may be sued by a citizen of a State in any district in which valid service of process can be made on the defendant. *Galveston, etc., R. Co. v. Gonzales*, 151 *U. S.* 496, 38 *L. ed.* 248. *In re Hohorst*, 150 *U. S.* 653, 37 *L. ed.* 1211.

This though the statutes of the State confer no authority upon any court to issue process against a foreign corporation in an action by a non-resident for a cause of action not arising therein. *Barrow Steamship Co. v. Kane*, 170 *U. S.* 100, 42 *L. ed.* 964.

A corporation organized in one State cannot remove a suit brought against it in another by a resident of a State other than that in which the action is brought without the consent of the plaintiff. *Baldwin v. Pacific Power & Light Co.*, 199 *Fed. R.* 291-294.

The rule is otherwise where the plaintiff is an alien. *Kalalta v. Rones*, 186 *Fed. R.* 30, 108 *C. C. A.* 132.

Held under a State statute requiring a foreign corporation to file a power of attorney appointing the State auditor to accept service of process, that where a non-resident corporation filed its power of attorney appointing the State auditor its attorney to accept service, but did not appoint any local person its attorney in fact for similar purpose under a statute applicable to domestic corporations, such foreign corporation's residence for the purpose of suit was not limited to the county wherein the seat of government was located or where the auditor resided, but it was liable to suit in any Federal District in the State. *Lemon v. Imperial, etc., Co.*, 199 *Fed. R.* 927-932.

A suit for infringement of a patent-right may be brought in any district where valid service of process on the defendant can be made. *In re Keasbey Co.*, 160 *U. S.* 221-230, 40 *L. ed.* 402; *In re Hohorst*, 150 *U. S.* 653, 37 *L. ed.* 1211; *Noonan v. Chester, etc., Co.*, 75 *Fed. R.* 334; *Allen v. Blunt*, 1 *Blatchf.* 480; *Fed. Cases*, 215.

Where jurisdiction is not challenged by pleading, it is sufficiently shown, if it is disclosed in any part of the record, including the proofs. *Mahoning Valley Ry. Co. v. O'Hara*, 196 *Fed. R.* 945, 116 *C. C. A.* 495.

A Federal court is not limited to the return on the summons or the declaration but may look to the entire record in determining its jurisdiction. *Wylie, etc., Co. v. Lynch*, 195 *Fed. R.* 386, 115 *C. C. A.* 288-302.

A railroad commission vested with executive, legislative and *quasi* judicial powers is not a State court within the meaning of sec. 720, *Rev. Stats. (U. S. Comp. Stats. 1901, p. 581)*, which prohibits any court of the United States from issuing an injunction restraining proceedings in any court of a State. *Louisville & N. R. Co. v. Brown*, 123 *Fed. R.* 946-948.

The foreclosure of mechanics' liens is essentially an equitable proceeding and where the State law gives a lien for labor and material and a remedy to enforce it at law or in equity, the Federal courts have jurisdiction of an equitable action. *Sheffield Furnace Co. v. Withrow*, 149 *U. S.* 574-579, 37 *L. ed.* 853.

The foreclosure of a mechanic's lien is essentially an equitable proceeding, and such lien may be enforced in a Federal court, notwithstanding the State statute giving the lien prescribed that it might be enforced in a designated State court. *Schmulbach v. Caldwell*, 196 *Fed. R.* 16, 115 *C. C. A.* 650.

Such lien may be enforced in equity notwithstanding the statute creating the lien gave a right of action at law. *Healey Ice Mach. Co. v. Green*, 191 *Fed. R.* 1004, 111 *C. C. A.* 668.

The assignee of an alien cannot bring suit in the Federal court of the State of which he is a citizen against a citizen of another State over the objection of such defendant.

The provision of the Act of 1888 (now Clause 1 of sec. 24, Judicial Code) that no Federal court shall take cognizance of any suit to recover the contents of any chose in action in favor of any assignee, unless such suit might have been prosecuted in such court if no transfer had been made must be read with that part of the act (now sec. 51, Judicial Code), which restricted the district in which actions could be prosecuted to that of the district of the residence of plaintiff or defendant where jurisdiction is founded only on the fact that the action is between citizens of different States. *Consolidated Rubber Tire Co. v. Ferguson*, 183 *Fed. R.* 756, 106 *C. C. A.* 330.

All parties on the one or the other side of the controversy must be residents of the district where suit is brought, unless defendants waive the privilege. *Greeley v. Lowe*, 155 *U. S.* 58, 39 *L. ed.* 69. See this case cited and distinguished in 80 *Fed. R.* 422.

The Act of 1887 omitted the clause (found in former acts) allowing a defendant to be sued in the district where he is found. Where juris-

diction was founded upon any of the causes specially mentioned in sec. 1 of the Act of Mar. 3, 1887, except the citizenship of the parties, *Held*, the action must be brought in the district in which the defendant was an inhabitant; but where the jurisdiction was founded solely upon the fact that the parties were citizens of different States the suit might be brought in the district in which either the plaintiff or the defendant resided. *McCormick Co. v. Walthers*, 134 *U. S.* 41-43, 33 *L. ed.* 833.

Under the Act of Mar. 3, 1887, *Held*: the Circuit Court had no jurisdiction on the ground of citizenship if there were two plaintiffs citizens of, and residents of, different States, and the defendant was a citizen of, and resident in, a third State, and suit was brought in a State in which one of the plaintiffs resided. *Smith v. Lyon*, 133 *U. S.* 315, 33 *L. ed.* 635.

The Act of 1887 omitted the provision of former acts, that if a party has the diverse citizenship required by statute, he may be sued in any district where he may be found. *Ib.* 319.

A suit between citizens of different States must be brought in the district where all the plaintiffs or all the defendants are inhabitants, if there are more than one plaintiff, or more than one defendant. *Ib.* 316.

Where the interest is joint each of the persons concerned in that interest must be competent to sue, or liable to be sued, in a Federal court. *Strawbridge v. Curtis*, 3 *Cranch*, 267, 2 *L. ed.* 435.

Under the Act of Mar. 3, 1887, as amended in 1888, the Circuit Court had no jurisdiction on the ground of diverse citizenship of a suit brought by residents of other districts than that in which the court was held against several defendants, only one of whom was a resident of that district. *Excelsior Pebble Phos. Co. v. Brown*, 74 *Fed. R.* 321-324, 20 *C. C. A.* 428.

Held: The provision of the Act of Mar. 3, 1887, that where jurisdiction is founded only on the facts of diverse citizenship, suit shall be brought only in the district of the residence of either the plaintiff or the defendant, did not touch the general jurisdiction of the court over a cause between such parties, but affected only the proceedings taken to bring the defendant within such jurisdiction, and was a matter of personal privilege which the defendant might insist upon or waive. *Interior Construction Co. v. Gibney*, 160 *U. S.* 217-219 (40 *L. ed.* 401), Oct. T., 1895.

The right to object that an action within the general jurisdiction of the court is brought in the wrong district is waived by entering a general appearance, without taking the objection. *Ib.* 220.

Where there are several defendants, some of whom are, and some of whom are not, inhabitants of the district in which the suit is brought, the question whether the defendants who are inhabitants of the district

may take the objection if the non-residents have not appeared, not decided. *Ib.* 220.

In this case defendants who had appeared generally filed a plea in abatement that other defendants who had not appeared were not residents of the State where suit was brought, *Held*, that a demurrer to this plea would lie, because having appeared generally defendants could not object.

Rev. Stats., sec. 740 (*U. S. Comp. Stats.* 1901, p. 587), providing that if there are two or more defendants residing in different districts of the State, the suit may be brought in either district, was not repealed, either expressly nor by implication, by the Acts of 1875 or 1887-1888, providing that no civil suit shall be brought against any person in any other district than that whereof he is an inhabitant. *Goddard v. Waller*, 80 *Fed. R.* 422-424.

NOTE: This section was repealed by the Judicial Code. Approved March 3, 1911, but the right was preserved by sec. 52.

In local actions defendants who are non-residents of the district where suit is brought might be joined by sec. 8 of Act of 1875, saved by sec. 5 of Act of 1888, making an exception to sec. 1, that no civil suit should be brought in any other district than that of which defendant is an inhabitant. *Greeley v. Lowe*, 155 *U. S.* 58-72, 39 L. ed. 69.

In local actions any defendant interested in the *res* may be cited to appear and answer provided he be not a citizen of the same State with the plaintiff. *Ib.*

A suit to remove cloud on title to real estate may be maintained in a district where the land is if the defendant is a citizen of another State. *Dick v. Foraker*, 155 *U. S.* 404-411, 39 L. ed. 201.

An equitable remedy given by a state statute may be enforced in a Federal court if the right to a jury trial is not impaired. *Ib.*

The Circuit (District) Courts are bounded by the limits of the jurisdictional district in which they sit. Whatever may be their jurisdiction over subject-matter as to persons and property it can only be exercised within the limits of their districts.

Congress might have authorized civil process from any Circuit (District) Court to run into any State of the Union. It has not done so. Civil processes does not run out of the district with the single exception of a subpoena for witnesses. Process of a Circuit (District) Court cannot be served without the district in which it is established without the special authority of law. *Tolland v. Sprague*, 12 *Pet.* 328, 9 L. ed. 1093.

Where there is no separable controversy there can be no removal from a State court by the defendants, unless all are citizens of different

States from the plaintiff and all join in the petition. *Fletcher v. Hamlet*, 116 U. S. 408-410, 29 L. ed. 679, Oct. T., 1885.

The Supreme Court has no power to review, on appeal or writ of error, an order of the Circuit (District) Court remanding a case to a State court; and such a remanding order not being a final judgment or decree the Act of Feb. 25, 1889 (25 Stat. L. 693), did not give jurisdiction. *Lawrence v. Rector*, 137 U. S. 139-141, 34 L. ed. 603, Oct. T., 1890.

The Act of Mar. 3, 1887 (24 Stat. L. 552), expressly prohibited a review of such order. *Richmond & D. R. Co. v. Thomson*, 134 U. S. 45-46, 33 L. ed. 872, Oct. T., 1889.

An order of the Circuit (District) Court allowing an appeal is subject to that court's power as long as the appeal remains unperfected and the cause has not passed into the jurisdiction of the appellate court. *Aspen Mining Co. v. Bellings*, 150 U. S. 31-35, 37 L. ed. 988. Citing Cases.

Under the rules in force prior to the revision promulgated November 4, 1912, *held*, when the citizenship necessary for the jurisdiction appears on the face of the record, evidence to contradict the record is not admissible except under a plea in abatement in the nature of a plea to the jurisdiction; a plea to the merits waived the jurisdiction. *Farmington v. Pillsbury*, 114 U. S. 138-143, 29 L. ed. 114.

Neither party has the right to introduce evidence not directed to the issues, for the purpose only of making out a case of want of jurisdiction. Whenever it appears by pertinent evidence directed to the issues that the court has not cognizance of the suit, either because of its nature or the parties, the court may itself dismiss the suit. *Hartog v. Memory*, 116 U. S. 588-591, 29 L. ed. 725.

If the court is led to suspect that there is collusion to confer jurisdiction it may cause inquiry to be made, either by having the proper issue joined or other appropriate way. *Ib.* 591.

A State law may give a substantial right of such a character that where there is no impediment arising from the residence of the parties the right may be enforced in the proper Federal tribunal whether it be a court of equity, of admiralty, or of common law. A party forfeits nothing by going in to a Federal tribunal. Jurisdiction having attached, his case is tried there upon the same principles, and its determination is governed by the same considerations as if it had been brought in the proper State tribunal of the same locality. *Ex parte McNeil*, 13 Wall. 236-243, 20 L. ed. 624.

A Circuit (District) Court of the United States is not governed in its practice in equity by the laws of the State in which it sits, but by the

rules of practice prescribed by the Supreme Court and by the Circuit (District) Court not inconsistent therewith, and when these are silent, by the practice of the High Court of Chancery in England, prevailing when the equity rules were adopted, so far as may reasonably be applied. *Pomeroy v. Manin*, 2 *Paine*, 476; *Fed. Cases*, 11,260.

If each of the indispensable adverse parties is not competent to sue or be sued, then the Circuit (District) Court cannot maintain cognizance of the suit. *Anderson v. Watt*, 138 *U. S.* 694-702, 34 L. ed. 1078.

A suit by an executor or administrator is deemed a controversy between such executor or administrator and the defendants and not between his testate or intestate and defendants. *Clarke v. Mathewson*, 12 *Pet.* 161-171, 9 L. ed. 1044; *Childrass v. Emery*, 8 *Wheat.* 642-669, 5 L. ed. 711.

Executors and administrators deemed to be the real parties in interest so that jurisdiction depends on the citizenship of such representatives and not on that of testator or intestate. It makes no difference that the testator or intestate was a citizen of the same State with the defendants and could not, if alive, have sued in the Federal court, neither does it defeat the jurisdiction that the creditors and legatees of the decedent are citizens of the same State with the defendants. *Rice Adm., etc., v. Houston Adm., etc.*, 13 *Wall.* 66, 20 L. ed. 484; *Continental Life Ins. Co. v. Rhoads*, 119 *U. S.* 237, 30 L. ed. 380.

The rule where an infant sues is that it is the infant and not the next friend who is the real party. The next friend suing on behalf of the infant is neither technically nor substantially the party, but resembles an attorney or guardian *ad litem*. The suit must be brought in the name of the infant. *Morgan v. Potter*, 157 *U. S.* 195, 39 L. ed. 670.

Where the jurisdiction of the Federal courts depends upon the citizenship of the parties it has reference to the parties as persons; the personal citizenship must be set out in the pleading. *Amory v. Amory*, 5 *Otto*, 186, 24 L. ed. 428.

Held in *Rice Adm., etc., v. Houston Adm., etc.*, 13 *Wall.* 66, 20 L. ed. 484, that in the absence of averments in the pleadings to the contrary the citizenship of an administrator was that of the State where he was appointed. *Contra* in *Continental Life Ins. Co. v. Rhoads*, 119 *U. S.* 237, 30 L. ed. 380, where the court said: "It is true the record does show that letters of administration were granted to her in Pennsylvania but that does not make her a citizen of that State. The jurisdiction must appear positively. It is not enough that it may be inferred argumentatively." See *Anderson v. Watt*, 138 *U. S.* 694, 34 L. ed. 1081.

Where the jurisdiction has once attached no subsequent change in interests (such as substitution of plaintiff as an administrator who lacks diverse citizenship) ousts jurisdiction. *Clarke v. Mathewson*, 12 *Pet.* 171, 9 L. ed. 1043.

Jurisdiction of Federal courts depends not upon the relative situation of the parties concerned in interest but upon the relative situation of the parties named on the record. Where trustees suing for others' benefit are personally qualified by their citizenship to sue in the Federal court the jurisdiction is not defeated by the fact that the parties whom they represent may be disqualified. *Susquehanna, etc., Ry. v. Blatchford*, 11 *Wall.* 172, 20 L. ed. 180.

Where the cause of action is transferred to the plaintiff, a citizen of the same State as defendant, *Held*: it did not oust the jurisdiction previously acquired. *Jarboe v. Templer*, 38 *Fed. R.* 206, and *Glover v. Sheppard*, 21 *Fed. R.* 481; *Contra Adams Executor v. Denver, etc., Co.*, 16 *Fed. R.* 712.

Where jurisdiction is made out by the averments of the bill, setting up the defense that will be made; if the answer when it comes in, disclaims and denies this defense the basis of jurisdiction fails. *Boston & M., etc., Co. v. Montana, etc., Co.*, 188 *U. S.* 643, 47 L. ed. 626.

Plaintiff cannot anticipate the defense by defendant and thus make a Federal question. *Fla. C. & P. Ry. v. Bill*, 176 *U. S.* 321, 44 L. ed. 436.

No local State statutes can impair the power of the United States courts to enforce the settled principles of equity in suits in which they have full jurisdiction; applied to local statute of limitations. *Kirby v. Lake Shore R. Co.*, 120 *U. S.* 130, 30 L. ed. 572.

Where a cause is removed from a State court by defendant he cannot move to dismiss for want of jurisdiction. He is in court by his own act and suit is to proceed as if brought by original process where the defendant had waived all objection to the jurisdiction and pleaded to the merits. *Bushnell v. Kenedy*, 9 *Wall.* 387, 19 L. ed. 739.

Cases cited as to when the assignee of a chose in action may sue. *Ib.*

In removal proceedings the petition and bond for removal are in the nature of process. *Kinney v. Columbia S. & L. Association*, 191 *U. S.* 82, 48 L. ed. 105.

RULES OF PRACTICE

FOR THE

COURTS OF EQUITY OF THE UNITED STATES

Promulgated by the Supreme Court of the United States, November 4, 1912.

Decisions

The Supreme Court cannot, by rule, enlarge or restrict the inherent jurisdiction and powers of the other courts of the United States. *Hudson v. Parker*, 156 *U. S.* 284, 39 L. ed. 426.

The Supreme Court may not adopt rules making decrees for payment of money a lien on land where no such charge is created by law, nor displace such statutory right. *Ward v. Chamberlain*, 2 *Black* (67 *U. S.*) 436, 17 L. ed. 322, where *Beers v. Haughton*, 9 *Pet.* 360, 9 L. ed. 157 is distinguished.

The Supreme Court is not authorized to adopt by rule any State law repugnant to the enactments of Congress. *Keary v. The Farmers', etc., Bank*, 16 *Pet.* (41 *U. S.*) 94, 10 L. ed. 899.

No practice or rule of the Circuit (District) Courts inconsistent or in conflict with the rules prescribed by the Supreme Court can control them. *Bank, etc., v. White*, 8 *Pet.* (33 *U. S.*) 260, 8 L. ed. 262; *Story v. Livingston*, 13 *Pet.* 368, 10 L. ed. 339; *Gaines v. Relf*, 15 *Pet.* 15; 10 L. ed. 9; *Gray v. Chicago, etc., Co.*, *Woolw.* 63; 10 *Fed. Cases*, 5,713.

The Circuit (District) Court may not dispense with a rule prescribed by the Supreme Court, nor any prescribed by statute. *Wallace v. Clark*, 3 *Woodb. & M.* 359; 29 *Fed. Cases*, 17,098.

The rules having been promulgated under authority of an act of Congress have the force of statutory regulation. *Winter v. Ludlow*, 16 *Leg. Int.* 332-340; *Fed. Cases*, 17,891.

The rules prescribed by the Supreme Court, in equity and admiralty, have all the force and effect of statutes of the United States. *Stevens v. Missouri, K. & T. R. Co.*, 104 *Fed. R.* 935.

The rules prescribed were not intended to deprive the Circuit (District) Court of power to mould its rules relating to the time and manner of appearing and answering by the exercise of sound discretion, to prevent injustice in the operation of the prescribed rules. *Ex parte Poultney v. City of La Fayette*, 12 *Pet.* 474, 9 L. ed. 472.

It is always in the power of the court to suspend its own rules, or to except a particular case from their operation whenever the purposes of justice require it. *United States v. Breitling*, 20 *How.* 254, 15 L. ed. 900; *Russell v. McLellan*, 3 *Woodb. & M.* 157; 21 *Fed. Cases*, 12,158.

The Circuit (District) Court has power to construe its rules. *Lawrence v. Bowman*, 1 *McAll.* 419; *Fed. Cases*, 8,134.

The great object of courts in adopting rules of practice is to facilitate the transaction of business without subjecting counsel to injustice. *Kimball v. Stewart*, 1 *McLean*, 332; *Fed. Cases*, 7,682.

The Supreme Court has the power to regulate the whole practice in suits in equity in the Circuit (District) Courts; but any Circuit (District) Court may regulate its own practice to advance justice, in any manner not inconsistent with law, or any rule prescribed by the Supreme Court. *Steam Stone Cutter Co. v. Jones*, 13 *Fed. R.* 581.

Equity rules are framed to bring a cause to a hearing. After hearing, failure to proceed regularly *in limine* is waived without objection. *Allen v. The Mayor, etc.*, 7 *Fed. R.* 484.

Under the rules in force prior to the revision promulgated November 4, 1912, where the rules prescribed for the equity practice of the Federal courts did not apply, the practice of the High Court of Chancery in England, as it existed prior to the adoption there of the "new rules," controlled. *Gaines v. Relf*, 15 *Pet.* 15, 10 L. ed. 9; *Goodyear v. Providence Rubber Co.*, 2 *Cliff.* 351; 10 *Fed. Cases*, 5,583; *Story v. Livingston*, 13 *Pet.* 368, 10 L. ed. 359.

The "new rules" were adopted in England in A. D. 1842.

The act for regulating process in the courts of the United States (now sec. 913, *Rev. Stats., U. S. Comp. Stats.* 1901, p. 683), adopts the principles, rules, and usages of the Court of Chancery of England. *Vattier v. Hinde*, 7 *Pet.* 252-274, 8 L. ed. 252.

In the Federal courts an equitable claim must be enforced according to the rules prescribed regulating proceedings in equity, although the State law authorizes legal and equitable claims to be blended in one suit. *Bennett v. Butterworth*, 11 *How.* 674, 13 L. ed. 669.

So, although by State law the distinction between actions at law and actions in equity has been abolished, and one form of action prescribed. *Thompson v. Railroad Companies*, 6 *Wall.* 134, 18 L. ed. 765.

Even by a rule of court the equity practice of a Circuit (District) Court of the United States cannot be departed from. *Bein v. Heath*, 12 *How.* 168–178, 13 L. ed. 168; *Gaines v. City, etc.*, 27 *Fed. R.* 411.

A party whose title or claim is an equitable one must follow the forms and rules of equity proceedings as prescribed by the Supreme Court under the authority of the Act of August 23, 1842, 5 Stat. 518, sec. 6 (sec. 917, *Rev. Stats*). *Hurst v. Hollingsworth*, 100 *U. S.* 100–103, 25 L. ed. 571.

These rules are simply rules of practice for regulating the mode of proceeding in the Circuit (District) Courts, and in no way affect their jurisdiction. *Lewis v. Shainwald*, 48 *Fed. R.* 492–493.

**RULE I—*District Court always Open for Certain Purposes—
Orders at Chambers***

The District Courts, as Courts of Equity, shall be deemed always open for the purpose of filing any pleading, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, rules, and other proceedings preparatory to the hearing, upon their merits, of all causes pending therein.

Any district judge may, upon reasonable notice to the parties, make, direct, and award, at chambers or at the clerk's office, and in vacation as well as in term, all such process, commissions, orders, rules, and other proceedings, whenever the same are not grantable of course, according to the rules and practice of the court.

Substantially Rules 1 and 3 of the rules adopted March 2, 1842.

Decisions

Confirmation of a sale by a master relates to final process and may be determined in vacation. *Central Trust Co. v. Sheffield, etc., Co.*, 60 *Fed. R.* 14.

The clerk's office is always open for the purpose of moving to suppress depositions irregularly taken. *Van Hook v. Pendleton*, 2 *Blatchf.* 85; *Fed. Cases*, 16,852.

After the close of the term an order made therein as a general rule must stand; but orders obtained upon motion may be discharged upon motion. *Eslava v. Mazange's Adm.*, 1 *Woods*, 623; *Fed. Cases*, 4,526.

RULE II—*Clerk's Office Always Open, Except, etc.*

The clerk's office shall be open during business hours on all days, except Sundays and legal holidays, and the clerk shall be in attendance for the purpose of receiving and disposing of all motions, rules, orders, and other proceedings which are grantable of course.

Substantially Rule 2 of the Rules adopted March 2, 1842.

RULE III—*Books Kept by Clerk and Entries Therein*

The clerk shall keep a book known as "Equity Docket," in which he shall enter each suit, with a file number corresponding to the folio in the book. All papers and orders filed with the clerk in the suit, all process issued and returns made thereon, and all appearances shall be noted briefly and chronologically in this book on the folio assigned to the suit and shall be marked with its file number.

The clerk shall also keep a book entitled "Order Book," in which shall be entered at length, in the order of their making, all orders made or passed by him as of course and also all orders made or passed by the judge in chambers.

He shall also keep an "Equity Journal," in which shall be entered all orders, decrees and proceedings of the court in equity causes in term time.

Separate and suitable indices of the Equity Docket, Order Book and Equity Journal shall be kept by the clerk under the direction of the court.

A substitute for Rule 4 of the Rules adopted March 2, 1842.

RULE IV—*Notice of Orders*

Neither the noting of an order in the Equity Docket nor its entry in the Order Book shall of itself be deemed notice to the parties or their solicitors; and when an order is made without prior notice to, and in the absence of, a party, the clerk, unless otherwise directed by the court or judge, shall forthwith send a copy thereof, by mail, to such party or his solicitor and

a note of such mailing shall be made in the Equity Docket, which shall be taken as sufficient proof of due notice of the order.

A substitute for the last three Clauses of Rule 4 of the Rules adopted March 2, 1842.

Decisions

Motion to dismiss a bill under old Equity Rule 38 denied where pleas, etc., filed were not entered in the order book as prescribed by old Rule 4. *Newby v. Oregon, etc., Co.*, 1 *Sawy.* 63; 18 *Fed. Cases*, 10,145.

Personal notice is required to obtain a paper, in the possession of the adverse party, to be used in evidence. *Bronson v. Kensey*, 3 *McLean*, 180; 4 *Fed. Cases*, 1,927. *Contra* if only to enable a party to plead. *Ib.*

RULE V—*Motions Grantable of Course by Clerk*

All motions and applications in the clerk's office for the issuing of mesne process or final process to enforce and execute decrees; for taking bills *pro confesso*; and for other proceedings in the clerk's office which do not require any allowance or order of the court or of a judge, shall be deemed motions and applications grantable of course by the clerk; but the same may be suspended, or altered, or rescinded by the judge upon special cause shown.

Similar to Rule 5 of the Rules adopted March 2, 1842.

Decisions

Granting of a *dedimus potestatem* is not a matter of right. *United States v. Parrott*, 1 *McAll.* 447; 27 *Fed. Cases*, 15,999.

The distinction between a motion grantable of course and a special one, is that a motion that requires an allowance from the judge, or a notice to the opposite party, is a special one; all others are grantable of course. *Ib.*

Special motions require notice to the adverse party. *United States v. Parrott*, 1 *McAll.* 447; 27 *Fed. Cases*, 15,999.

Motion to dissolve an injunction must be personal, or by setting it down, and sufficient time must be allowed to take affidavits. *Wilkins v. Jordan*, 3 *Wash. C. C.* 226; 29 *Fed. Cases*, 1,252.

A motion for an order to issue a writ of attachment for the arrest of a person guilty of violating an injunction requires notice to the party charged. *Gray v. Chicago, etc., Co.*, *Woolw.* 63; 10 *Fed. Cases*, 5,713.

Rev. Stats., sec. 948 *U. S. Comp. Stats.* 1901, p. 695. Any Circuit or District Court may at any time, in its discretion, and upon such terms as it may deem just, allow an amendment of any process returnable to or before it, where the defect has not prejudiced, and the amendment will not injure, the party against whom such process issues.

Rev. Stats., sec. 4063 *U. S. Comp. Stats.* 1901, p. 2760. Process issued from any United States or State court, against the person or goods of any foreign minister, or against the person of the domestic servant of such minister, is void.

Rev. Stats., sec. 4064 *U. S. Comp. Stats.* 1901, p. 276. Person and attorney obtaining, and officer executing, such process subject to fine or imprisonment.

Rev. Stats., sec. 4065 *U. S. Comp. Stats.* 1901, p. 2761. When process may be issued against persons in the service of foreign ministers.

Sec. 50, Judicial Code. When there are several defendants in any suit at law or in equity, and one or more of them are neither inhabitants of nor found within the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction, and proceed to the trial and adjudication of the suit between the parties who are properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process, nor voluntarily appearing to answer; and non joinder of parties who are not inhabitants of, nor found within the district, as aforesaid, shall not constitute matter of abatement or objection to the suit.

Sec. 57, Judicial Code. When in any suit commenced in any District Court of the United States to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of, or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur, by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be: or where such personal service upon such absent defendant or defendants is not practicable such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks. In case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time, to be allowed by the court in its discretion, and upon proof of the service or publication of said order, and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction and proceed to the hearing and adjudication of such suit, in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants, without appearance, affect only the

Previous notice of a motion for the appointment of a receiver is not necessary, when counsel of the opposite party is present in court. *McLean v. Lafayette Bank*, 3 *McLean*, 503; 16 *Fed. Cases*, 8,887.

RULE VI—*Motion Day*

Each District Court shall establish regular times and places, not less than once each month, when motions requiring notice and hearing may be made and disposed of; but the judge may at any time and place, and on such notice, if any, as he may consider reasonable, make and direct all interlocutory orders, rulings and proceedings for the advancement, conduct and hearing of causes. If the public interest permits, the senior circuit judge of the circuit may dispense with the motion day during not to exceed two months in the year in any district.

A new rule promulgated November 4, 1912.

RULE VII—*Process, Mesne and Final*

The process of subpoena shall constitute the proper mesne process in all suits in equity, in the first instance, to require the defendant to appear and answer the bill; and, unless otherwise provided in these rules or specially ordered by the court, a writ of attachment and, if the defendant cannot be found, a writ of sequestration, or a writ of assistance to enforce a delivery of possession, as the case may require, shall be the proper process to issue for the purpose of compelling obedience to any interlocutory or final order or decree of the court.

Substantially Rule 7 of the Rules adopted March 2, 1842.

Statutory Provisions

Rev. Stats., sec. 911 *U. S. Comp. Stats.* 1901, p. 683. All writs and processes issuing from courts of the United States shall be under the seal of the court from which they issue, and be signed by the clerk thereof. Process of the Supreme and Circuit Courts bear teste of the chief justice of the Supreme Court; of the District Court bear teste of the judge thereof. All processes bear teste from the day of issue.

Note. See Section 291 Judicial Code.

Rev. Stats., sec. 948 U. S. Comp. Stats. 1901, p. 695. Any Circuit or District Court may at any time, in its discretion, and upon such terms as it may deem just, allow an amendment of any process returnable to or before it, where the defect has not prejudiced, and the amendment will not injure, the party against whom such process issues.

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Sec. 57, Judicial Code. When in any suit commenced in any District Court of the United States to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of, or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur, by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be: or where such personal service upon such absent defendant or defendants is not practicable such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks. In case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time, to be allowed by the court in its discretion, and upon proof of the service or publication of said order, and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction and proceed to the hearing and adjudication of such suit, in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants, without appearance, affect only the

property which shall have been the subject of the suit and under the jurisdiction of the court therein within such district, and when a part of the said real or personal property against which such proceedings shall be taken shall be within another district, but within the same State, said suit may be brought in either district in said State; *Provided*, however, that any defendant or defendants not actually personally notified as above provided may, at any time within one year after final judgment in any suit mentioned in this section, enter his appearance in said suit in said District Court, and thereupon the said court shall make an order setting aside the judgment therein, and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the court shall deem just; and thereupon said suit shall be proceeded with to final judgment according to law."

Decisions

Congress may undoubtedly prescribe the forms and modes of procedure in the judicial tribunals it establishes to carry into execution the judicial powers delegated to it by Congress. *Steamer St. Lawrence*, 1 *Black*, 522-528, 17 L. ed. 183, Dec. T., 1863.

Jurisdiction over parties is acquired only by a service of process, or their voluntary appearance. If necessary defendants decline to appear and process cannot be served upon them, the court is without jurisdiction over essential parties and the bill must be dismissed. *Herndon v. Ridgway*, 17 *How.* 424-425, 15 L. ed. 100.

The court has no authority to issue process to another State. *Herndon v. Ridgeway*, 17 *How.* 425, 15 L. ed. 101.

The special order of service authorized by *Rev. Stats.*, sec. 738 (*U. S. Comp. Stats.* 1901, p. 587, sec. 57, Judicial Code), may be had without the issuance of a subpoena, where the bill shows the defendants are non-residents. *United States v. American Lumber Co.*, 80 *Fed. R.* 309-314.

The issuance of a subpoena against a non-resident defendant to be served in another district is not the commencement of a suit, but a mere nullity; otherwise, if the subpoena is delivered to the proper officer to be served *bona fide*, and on failure substituted service had. *Ib.* 315-320.

An action is not deemed commenced so far as the defendant is concerned, so as to stop the running of a statute of limitations until appropriate process has been issued and there has been a *bona fide* attempt to serve the same. *Ib.* 316.

A party to a suit which as to him is an original proceeding cannot be brought before the court in a foreign jurisdiction by an order for

substituted service, and its service upon a law firm retained to represent him, but who are not legal and acknowledged general representatives. *Shainwald v. Davids*, 69 *Fed. R.* 701.

The practice as to substituted service stated. *Ib.* 702.

Substituted service upon complainant's attorney is allowed upon filing a cross-bill. The application of the rule for substituted service is denied to cross-bills relating to new and independent causes of action in which the complainant's attorney has not been retained. *Fidelity Trust & S. V. Co. v. Mobile St. Ry. Co.*, 53 *Fed. R.* 850-852.

Service of process upon the president of a non-resident corporation, not doing business in the State where suit is brought, while temporarily within the district, does not confer jurisdiction. *Ib.* 853.

A supplemental bill is a mere adjunct to the original bill, and where the parties have already been served (or have appeared) no further subpoena for them is required upon a supplemental bill. *Shaw v. Bill*, 95 *U. S.* 10-14, 24 *L. ed.* 333.

A rule to show cause why an attachment for contempt should not issue must be served personally. If service is evaded or other special cause exists, service at the last place of abode of the party is deemed sufficient. *Hollingsworth v. Duane*, 1 *Wall. Sr.* 141; *Fed. Cases*, 6,617.

An attachment for contempt must be entitled with the names of the parties. *United States v. Wayne*, 1 *Wall. Sr.* 134; *Fed. Cases*, 16,654.

A voluntary appearance after revivor of suit is a waiver of process. *Carrington v. Brents*, 1 *McLean*, 167; *Fed. Cases*, 2,446.

The Circuit (District) Courts can issue no process beyond the limits of their districts. *Tolland v. Sprague*, 12 *Pet.* 300-330, 9 *L. ed.* 1105, Jan. T., 1838.

Independently of positive legislation, process can only be served upon persons within the same district where issued. *Ib.* 330.

The acts of Congress adopting the State process, adopt the form and mode of service, only so far as the persons are rightfully within the reach of such process. *Ib.* 330.

No jurisdiction can be acquired (even as against property) by attaching property of a non-resident defendant pursuant to State attachment laws. The right to attach property to compel the appearance of persons may be used only when such persons are amenable to the process of the court *in personam*. *Ib.* 330.

Dissenting opinion upon the holding that the Circuit Courts had not the power to issue process of attachment against property of a debtor, not an inhabitant of United States. *Ib.* 336.

A court does not acquire jurisdiction of a foreign corporation resident of another district, by attaching property within its jurisdiction. *Day v. Rubber Co.*, 1 *Blatchf.* 630; *Fed. Cases*, 3,685.

Where no service is made on a defendant not found in the district, an attachment levied on property of such non-resident defendant is void, and his subsequent appearance does not waive its invalidity. *Noyes v. Canada*, 30 *Fed. R.* 665.

Defendants in chancery may waive process and appear; this having been done in good faith they are as much bound as if regularly served with process. *Nelson v. Moon*, 3 *McLean*, 319; *Fed. Cases*, 10,111.

To give jurisdiction notice must be served on infants, even where court appoints guardian *ad litem*. *Ib.*

Under the rules in force prior to the revision promulgated November 4, 1912, *Held* the right to object that an action within the general jurisdiction of the court, is brought in the wrong district, was waived by entering a general appearance. *Interior Construction Co. v. Gibney*, 160 *U. S.* 217-219, 40 *L. ed.* 401.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held* the right to be sued in the proper district is a personal privilege which was waived by a general appearance. *Tolland v. Sprague*, 12 *Pet.* 300, 9 *L. ed.* 1093.

Under the Act of 1887, where jurisdiction was founded on diverse citizenship only, *Held* the complaint must show that one of the parties resided in the district where suit was brought. *Laskey v. Newtown Co.*, 50 *Fed. R.* 634.

Jurisdiction must be affirmatively shown in suits brought in the Federal courts. *Ib.* 636.

In any cause in which either plaintiff or defendant is a citizen of a State in which suit is brought and the adverse party is a citizen of another State, the privilege of being sued in the proper district may be waived by appearance and pleading to merits. *Central Trust Co. v. Virginia, etc., Co.*, 55 *Fed. R.* 769-773.

Held, the requirement of the Act of 1887, that one of the parties should be a citizen of the State in which suit was brought, could not be waived by consent or by appearance and pleading to merits. *Ib.*

Where the parties are corporations organized under laws of other States the fact that one of them has its principal place of business in the district where suit is brought does not affect the question of jurisdiction, and jurisdiction in such case is not conferred by appearance and pleading to merits. *Ib.* 773-774.

Under the Judiciary Act of 1789 it was not necessary to aver on the record that the defendant was an inhabitant of the district or found therein. *Gracie v. Palmer*, 8 *Wheat.* 699, 5 L. ed. 719.

Held, under the law as it existed prior to the Act of Mar. 3, 1887, that although no civil suit may be brought in a Federal court by original process in any district where the defendant is not a resident or is not found, yet by secs. 2 and 4 of the Act of Mar. 3, 1875 (18 *Stat. L.* 470), suits commenced in the State courts against non-residents by attachment might be removed into the Circuit Courts of the United States and there determined. The legislation authorizing such removal and determination, *Held*, constitutional. *United States v. Ottman*, 1 *Hughes*, 313; *Fed. Cases*, 15,977.

A suit begun in a State court by attachment of property and removed into the Federal court upon petition of defendant, will not be dismissed upon motion of the defendant for want of jurisdiction. Whether the court, by removal proceedings, had acquired full jurisdiction of the person of the defendant, or might retain the case as a proceeding *in rem*, not decided. *Purdy v. Wallace Müller Co.*, 81 *Fed. R.* 513-517.

Held that sec. 915, *Rev. Stats.* (*U. S. Comp. Stats.* 1901, p. 684) was to be read in connection with sec. 739, *Rev. Stats.* (*U. S. Comp. Stats.* 1901, p. 587), and authorized an attachment or garnishment only when the court had acquired jurisdiction of the defendant. *Ex parte Railway Co.*, 103 *U. S.* 794, 103 L. ed. 401; *Lachett v. Rumbaugh*, 45 *Fed. R.* 23-30; *Chittenden v. Darden*, 2 *Woods*, 437; *Fed. Cases*, 2,688.

It is not necessary that the authority of an attorney to appear shall appear on the face of the record. *Osborne v. U. S. Bank*, 9 *Wheat.* 738, 23 L. ed. 378.

It is unnecessary for an attorney who prosecutes for a corporation to produce a warrant of attorney under seal. *Ib.*

When appearance and defense are made by a regular practicing attorney, it is presumed to be by authority; but an appearance by counsel, who has no authority to waive process or defend the suit, may be explained. *Shelton v. Tiffin*, 6 *How.* 163-185, 12 L. ed. 387.

The party is not bound by proceedings where there has been no appearance or process served, or where appearance has been entered by an attorney without authority. *Ib.*

In cases where a resident of another district may be lawfully served with process the subpoena should be directed to the marshal of the

district where the defendant resides. *Seybert v. Shamokin, etc., Ry.*, 110 *Fed. R.* 810-811.

RULE VIII—*Enforcement of Final Decrees*

Final process to execute any decree may, if the decree be solely for the payment of money, be by a writ of execution, in the form used in the District Court in suits at common law in actions of *assumpsit*. If the decree be for the performance of any specific act, as, for example, for the execution of a conveyance of land or the delivering up of deeds or other documents, the decree shall, in all cases, prescribe the time within which the act shall be done, of which the defendant shall be bound, without further service, to take notice; and upon affidavit of the plaintiff, filed in the clerk's office, that the same has not been complied with within the prescribed time, the clerk shall issue a writ of attachment against the delinquent party, from which, if attached thereon, he shall not be discharged, unless upon a full compliance with the decree and the payment of all costs, or upon a special order of the court, or a judge thereof, upon motion and affidavit, enlarging the time for the performance thereof. If the delinquent party cannot be found a writ of sequestration shall issue against his estate, upon the return of *non est inventus*, to compel obedience to the decree. If a mandatory order, injunction or decree for the specific performance of any act or contract be not complied with, the court or a judge, besides, or instead of, proceeding against the disobedient party for a contempt or by sequestration, may by order direct that the act required to be done be done, so far as practicable, by some other person appointed by the court or judge, at the cost of the disobedient party, and the act, when so done, shall have like effect as if done by him.

An amendment of Rule 8 of the Rules adopted March 2, 1842

Statutory Provisions

Rev. Stats., sec. 985] *U. S. Comp. Stats.*, 1901, p. 707. Executions run into all the districts of a State.

Rev. Stats., sec. 986] *U. S. Comp. Stats.* 1901, p. 707. Executions in favor of the United States run into every State and Territory.

Decisions

A marshal has no right to receive other than lawful money of the United States in discharge of an execution; if he does so without plaintiff's authority the court will refuse to quash a second *feri facias*. *Griffin v. Thompson*, 2 *How.* 244-256, 11 L. ed. 244.

A motion against the marshal to compel him to pay over money collected is not a new suit and the residence of the parties need not be averred. *Gwin v. Breedlove*, 2 *How.* 29-34, 11 L. ed. 29.

It is a well-settled principle of law that if an execution come into the hands of a sheriff to be executed he is bound to complete the execution, though his term of office has expired. The same rule applies to a marshal. *McFarlane v. Gwin*, 3 *How.* 717, 11 L. ed. 717. See sec. 790, *Rev. Stats., U. S. Comp. Stats.* 1901, p. 609, *post*, p. 457.

The Circuit (District) Court may by rule adopt the law of a State giving a lien by attachment in a suit in equity. *Steam Stone Cutter Co. v. Jones*, 13 *Fed. R.* 567-577-582.

Rule 8 does not apply to a mesne attachment in an equity suit, and there is nothing inconsistent with the rule in having such an attachment, where a special rule of court authorizes it. *Ib.* 581.

RULE IX—Writ of Assistance

When any decree or order is for the delivery of possession, upon proof made by affidavit of a demand and refusal to obey the decree or order, the party prosecuting the same shall be entitled to a writ of assistance from the clerk of the court.

Same as Rule 9 of the Rules adopted March 2, 1842.

Decisions

The right to employ this writ is only against parties to the suit and those coming in under them after suit commenced. *Thompson v. Smith*, 1 *Dill.* 458; *Fed. Cases*, 13,977.

The writ of assistance is the appropriate process to place a purchaser of mortgaged premises in possession after receipt of the master's deed. *Terrell v. Allison*, 21 *Wall.* 289-291, 22 L. ed. 634.

One who undertakes, during the pendency of a suit regarding real estate, to acquire rights therein under the defendant, may be dispos-

essed by a writ of possession, and a court of equity is without jurisdiction to give relief to such evicted person until he has established his title at law. *Lacassagne v. Chapuis*, 144 *U. S.* 119-124, 36 L. ed. 368.

It is well settled in regard to land that when a suit is pending in regard to it, a person who purchases under the defendant *pendente lite* is subject to the operation of the writ of possession, if one is finally issued on a judgment in the suit. *Walden v. Bodley*, 9 *How.* 34-39, 13 L. ed. 34; *Tilton v. Cofield*, 93 *U. S.* 163, 23 L. ed. 858; *County of Warren v. Marcy*, 97 *U. S.* 96-105, 24 L. ed. 977; *Union Trust Co. v. Southern Navigation Co.*, 130 *U. S.* 565-571, 32 L. ed. 1043; *Mellen v. Moline Iron Works*, 131 *U. S.* 352-371, 33 L. ed. 178.

A court having acquired jurisdiction of a person or property cannot be deprived of it, and no other court has the right to interfere with such custody or possession. *Ableman v. Booth*, 21 *How.* 506, 16 L. ed. 176; *In re Johnson*, 167 *U. S.* 120-125, 42 L. ed. 103.

In this case there was a default decree on a bill alleging that goods purchased of plaintiff had been transferred by debtor in payment of land claimed after decree as homestead by defendant.

A writ of assistance will be granted when the defendants in a creditor's bill refuse to surrender under the decree. *Pratt v. Burr*, 5 *Biss.* 36; *Fed. Cases*, 11,372.

A subsequent purchaser from a purchaser at a master's sale is not entitled as of right to assistance to obtain possession of premises purchased under decree by his grantor; yet where the court has ordered a receiver to turn over property sold under decree to the assignee of a purchaser, such assignee held entitled to the benefit of old Rule 9. *Farmers' L. & T. Co. v. Chicago & Atl. Ry. Co.*, 44 *Fed. R.* 653-659.

Where a writ of assistance was granted receivers appointed, and by leave of court a petition of intervention was filed to set aside the writ of assistance, and deliver property seized thereunder to the intervenor, and after hearing the court denied the claim of intervenor and dismissed the petition, *Held*: such finding was a determination of the rights of the intervenor, and a final appealable order. That petitioner became a party to the suit to such an extent as to acquire a right of appeal from the order. *Dexter Horton Natl. Bank, etc., v. Hawkins*, 190 *Fed. R.* 924, 111 *C. C. A.* 514.

Although the bill to establish title to land did not specifically pray that complainant be put in possession, upon final decree for complainant, that he was entitled to the possession of land sued for and an easement in a certain street, the writ of assistance was properly awarded, in effect-

uation of the decree and in accordance with Rule 9. *Gormley v. Clark*, 134 *U. S.* 338-350, 33 L. ed. 914.

Upon a bill to remove a cloud on title a decree establishing title to land necessarily includes and carries with it the right of possession to the premises in suit as effectually as if the defendants had conveyed them to complainant. In legal effect and operation such a decree entitles the complainant to the possession of the property and that right passes to an assignee of complainant's title.

The writ of assistance to effectuate a decree in equity is within the jurisdiction of courts of equity to avoid the relitigation of questions once settled between the parties. *Root v. Woolworth*, 150 *U. S.* 401-412, 37 L. ed. 1126.

RULE X—*Decree for Deficiency in Foreclosures, etc.*

In suits for the foreclosure of mortgages, or the enforcement of other liens, a decree may be rendered for any balance that may be found due to the plaintiff over and above the proceeds of the sale or sales, and execution may issue for the collection of the same, as is provided in Rule 8 when the decree is solely for the payment of money.

An amendment of Rule 92 adopted December Term, 1863.

Decisions

Under the rules in force prior to the revision promulgated November 4, 1912, *Held* where the proceeds of the sale were less than the amount due on the mortgage debt as decreed, the complainant was entitled, as a matter of right under Rule 92, to a deficiency decree. *Northwestern M. L. Ins. Co. v. Keith*, 77 *Fed. R.* 374-375, 23 *C. C. A.* 196.

A special prayer for a decree for such deficiency as may be found, while the proper practice, is not necessary; the decree may be under the prayer for general relief. *Seattle L. S. & E. Ry. Co. v. Union Trust Co.*, 79 *Fed. R.* 179-188, 24 *C. C. A.* 512.

The case made by the bill must show that the balance claimed is due, otherwise it cannot properly be found so under the rule, which does not authorize courts to find a balance due because partial extinguishment has been effected by sale, if the indebtedness be not then payable. *Ohio Central R. Co. v. Central Trust Co.*, 133 *U. S.* 83-91, 33 L. ed. 563, Oct. T., 1889.

A decree of foreclosure is not a decree against the person and cannot be enforced by an execution against goods and lands generally. It is

simply a decree for the sale of the land mortgaged, that the proceeds may be applied to the debt. The rule has not changed the nature of the decree for foreclosure and sale; it was intended only to obviate the necessity for a separate action. *Kountz v. Hotel Company*, 107 U. S. 378-391, 27 L. ed. 615, Oct. T., 1882.

Under the practice of Courts of Chancery in England no execution could issue for a deficiency upon the foreclosure of a mortgage, *Held* (in 1863) that there was no rule authorizing such execution in the Federal courts. *Noonan v. Lee*, 67 U. S. 499, 17 L. ed. 279) as explained in *Orchard v. Hughes*, 1 Wall. 73, 17 L. ed. 561.

Former Rule 92 was then promulgated.

RULE XI—*Process in Behalf of and Against Persons not Parties*

Every person, not being a party in any cause, who has obtained an order, or in whose favor an order shall have been made, may enforce obedience to such order by the same process as if he were a party; and every person, not being a party, against whom obedience to any order of the court may be enforced, shall be liable to the same process for enforcing obedience to such orders as if he were a party.

An amendment of Rule 10 of the Rules adopted March 2, 1842.

RULE XII—*Issue of Subpoena—Time for Answer*

Whenever a bill is filed, and not before, the clerk shall issue the process of subpoena thereon, as of course, upon the application of the plaintiff, which shall contain the names of the parties and be returnable into the clerk's office twenty days from the issuing thereof. At the bottom of the subpoena shall be placed a memorandum, that the defendant is required to file his answer or other defense in the clerk's office on or before the twentieth day after service, excluding the day thereof; otherwise the bill may be taken *pro confesso*. Where there are more than one defendant, a writ of subpoena may, at the election of the plaintiff, be sued out separately for each defendant, or a joint subpoena against all the defendants.

An amendment of Rule 12 of the Rules adopted March 2, 1842.

Statutory Provisions

Sec. 52, Judicial Code.] If there are two or more defendants residing in different districts of a State suit may be brought in either district and process run to the marshal of the other district when endorsed by the clerk.

Sec. 55, Judicial Code.] When land lies in different districts of a State, process may run into both.

Sec. 12 of the Act of Feb. 4, 1887, 24 *Stat. L.* 379, gives power to the Interstate Commerce Commission to subpoena witnesses from any place in the United States at any designated place of hearing, and gives power to any Circuit (District) Court of the United States within the jurisdiction where an inquiry is being held to issue an order to appear and punish for contempt upon failure to obey.

Sec. 5 of the Act approved July 2, 1890, c. 647, 26 *Stat. L.* 209 (the Sherman Act) authorizes service of process in suits under that act to run into any District throughout the United States.

Decisions

The subpoena is issued by the clerk as of course. *United States v. American Lumber Co.*, 80 *Fed. R.* 309-313.

An action is not begun so far as the defendant is concerned by the mere filing of a bill which alone will not prevent the operation of a statute of limitation unless process is taken out and a *bona fide* attempt made to serve it. *Ib.*

When a complainant has in good faith obtained process or done all that is necessary to obtain process to bring a defendant before the court his suit is begun as to that defendant within the meaning of sec. 8 of the Act of Mar. 3, 1875 (sec. 738, *Rev. Stats. U. S. Comp. Stats.* 1901, p. 587). *Bisbee v. Evans*, 17 *Fed. R.* 474.

Two or more defendants, residents and inhabitants of different districts of the same State, may be sued in either district. In such suit the clerk should issue a duplicate subpoena as provided in sec. 740, *Rev. Stats.* (sec. 52, Judicial Code). *John D. Park & Sons Co. v. Bruen*, 133 *Fed. R.* 806-807.

The decisions upon this point are not uniform. *Ib.*

In a suit by junior mortgagees, holders of prior¹ liens cannot be made parties except by service of process or voluntary appearance. No general notice requiring them to present their claims will bind them. *Young v. Montgomery, etc., R. Co.*, 2 *Woods*, 606; *Fed. Cases*, 18,166.

After a decree disposing of the issues has been made, it is not competent for one of the parties, without service of new process or appearance, under the title of the original cause, to institute further proceedings on new issues although connected with the subject-matter of the original litigation. *Smith v. Woolfolk*, 115 *U. S.* 143-148, 29 *L. ed.* 357.

New parties, not connected with plaintiff in the original suit, cannot be required by constructive service to appear to an ancillary suit. *Bowen v. Christian*, 16 *Fed. R.* 729.

A return that notice has been served on defendant, *Held* to refer to the memorandum at the bottom of the subpoena. *Allen v. Blunt*, 1 *Blatchf.* 480; *Fed. Cases*, 215.

In cases other than embraced in sec. 738, *Rev. Stats. (U. S. Comp. Stats.* 1901, p. 587, sec. 57, Judicial Code), Federal courts have no power to effect non-residents by constructive service. *Parsons v. Howard*, 2 *Woods*, 1; *Fed. Cases*, 10,777.

That a defendant is a non-resident or absent may be shown by affidavit or other evidence. *Held* under the rules in force prior to the revision promulgated November 4, 1912, the order for appearance authorized by sec. 738, *Rev. Stats. (U. S. Comp. Stats.* 1901, p. 587, sec. 57, Judicial Code), is not a subpoena or a summons within the meaning of old Rules 15 and 17. *Forsyth v. Pierson*, 9 *Fed. R.* 801-803.

Held, the privilege of exemption from suit outside of the district of inhabitance, given by the Act of Mar. 3, 1887, might be waived by a general appearance or by pleading to the merits. An objection to jurisdiction made for the first time by motion in arrest of judgment is too late. *Southern Ex. Co. v. Todd*, 56 *Fed. R.* 104-106, 5 *C. C. A.* 432.

Held that appearance and pleading to the merits would not dispense with the requirement of the Act of Mar. 3, 1887 (sec. 51, Judicial Code), that either the plaintiff or defendant must be a citizen of the State in which the suit is brought, the requirement being jurisdictional. *Central Trust Co. v. Va. T. & C. Steel Co.*, 55 *Fed. R.* 769-773.

RULE XIII—*Manner of Serving Subpœna*

The service of all subpoenas shall be by delivering a copy thereof to the defendant personally, or by leaving a copy thereof at the dwelling-house or usual place of abode of each

defendant, with some adult person who is a member of or resident in the family.

An amendment of Rule 13 of the Rules adopted March 2, 1842.

Decisions

A court has no jurisdiction over a citizen of another State temporarily in a district where process issued. *Smith v. Tuttle*, 5 *Biss.* 195; *Fed. Cases*, 12,130.

Held, in a suit at law, that under the Act of 1887 service on a defendant while temporarily in the district of plaintiff's residence, and within the territorial jurisdiction of the court, is valid. *Jewett v. Garrett*, 47 *Fed. R.* 625.

Personal service of subpoena must be made on each defendant or by leaving a copy for each at his or her usual place of abode with some adult member of the family. *O'Hara v. MacConnell*, 93 *U. S.* 150, 23 *L. ed.* 840.

Robinson v. Cathcart, 2 *Cr. C. C.* 590, *Fed. Cases*, 11,946, holding where husband and wife are parties service on the husband alone good, decided under the old rules which were amended in 1875.

Rule complied with if service at the door outside the dwelling. *Phoenix Ins. Co. v. Wulf*, 1 *Fed. R.* 775.

A return served on "an adult person who is a resident in the place of the abode" of the defendant not a compliance with Rule 13. *Blythe v. Hinckley*, 84 *Fed. R.* 228.

Under the rule that the writ be served personally or if defendant be not found, by leaving a copy thereof at his or her dwelling house or usual place of abode, a return "Executed on the defendant H. by leaving a true copy at his residence" not in conformity with the rule. *Harris v. Hardeman*, 14 *How.* 334, 14 *L. ed.* 444.

If a person declines to receive from an officer a paper presented for service, the officer may deposit it in any convenient place in the presence of the party, and it will be a good service. *Norton v. Meader*, 4 *Sawy.* 603; *Fed. Cases*, 10,351.

A return which declared that the subpoena had been handed to a person at the domicile of the defendant, and who resided at said domicile, the defendant being absent, was held insufficient as not stating it was

left with a member or resident in the family of the defendant. *Von Roy v. Blackman*, 3 *Woods*, 98; *Fed. Cases*, 16,997.

Under a State statute allowing notice of a suit to be posted upon the front door of defendants' "usual place of abode" if defendant not living or having his home in the house, posting notice at last place of abode not a compliance with statute. *Earle v. McVeigh*, 91 *U. S.* 503, 23 *L. ed.* 398.

One who has resided in a State for a considerable time, there engaged in business, may be presumed to be a citizen of such a State, unless the contrary appears. *Shelton v. Tiffin*, 6 *How.* 163-185, 12 *L. ed.* 387.

The provision of sec. 11 of the Judiciary Act of 1789, that no civil suit shall be brought by original process in any other district than that of which the defendant is an inhabitant or shall be found at the time of serving the writ, was not repealed by the provision of the Bankrupt Act nor by sec. 6 of the Act of June 1, 1872, *Rev. Stats.*, sec. 915 (*U. S. Comp. Stats.* 1901, p. 684), adopting existing provisions of State laws, allowing the attachment of property. *Nazro v. Cragin*, 3 *Dill.* 474; *Fed. Cases*, 10,062.

The Judiciary Act of 1789 did not contemplate compulsory process against any person not an inhabitant of or found within the district. *Picquet v. Swan*, 5 *Mason*, 35; *Fed. Cases*, 11,134.

The Act of Aug. 13, 1888, c. 866, sec. 1, "that no suit shall be brought in the Circuit Court against any person by any original process . . . in any other district than that whereof he is an inhabitant," applied only to suits commenced in that court; it is no bar to the jurisdiction of the Circuit (District) Court of a case removed to it from a State court, that defendant is not a resident of the district; and that the State court had acquired jurisdiction by foreign attachment. *Crocker N. Bk. v. Pagensticker*, 44 *Fed. R.* 705; *Richmond v. Brookings*, 48 *Fed. R.* 241.

Held under the Act of May 4, 1858, sec. 740, *Rev. Stats.* (*U. S. Comp. Stats.* 1901, p. 587, sec. 52, Judicial Code), a bill averring residence of the defendants in different districts of the State might pray process in duplicate for execution by the respective marshals. *Wenter v. Ludlow*, 16 *Leg. Int.* 332; *Fed. Cases*, 17,891, p. 341.

Under *Rev. Stats.*, sec. 740 (*U. S. Comp. Stats.* 1901, p. 587), a subpoena issued in a suit pending in one district might be served in another district of the same State. *Ib.*

Under the Act of Feb. 28, 1839, sec. 737, *Rev. Stats.* (*U. S. Comp. Stats.* 1901, p. 587, sec. 50, Judicial Code), if the parties to a joint contract

are served with process it need not appear that one, a non-resident of the district where suit is brought, was served within the district. *McCloskey v. Cobb*, 2 *Bond*, 16; *Fed. Cases*, 8,702.

A foreign attachment cannot be maintained in the Circuit (District) Court against a principal defendant unless he is an inhabitant of the district where the suit is brought, or is found within it at the time he is served with process. Service upon a garnishee within the district is not sufficient to found a judgment against the principal. *Richmond v. Dreyfous*, 1 *Sumn.* 131; 20 *Fed. Cases*, 11,799.

Process from the Circuit (District) Court cannot be served without the district except in suits in equity to enforce a lien or claim against real or personal property within the district, and also in case of an action brought for infringement of a patent right. *Cely v. Griffin*, 113 *Fed. R.* 981.

Held that *Rev. Stats.*, sec. 738 (*U. S. Comp. Stats.* 1901, p. 587, sec. 57, Judicial Code), refers to a lien existing anterior to the suit and not one caused by the institution of the suit itself. *Dormitzer v. Illinois, etc., Co.*, 6 *Fed. R.* 217-218.

Where the bill itself showed that the defendants were non-residents the only legal way they could be served with process was by the special order of service required by sec. 738, *Rev. Stats.* (*U. S. Comp. Stats.* 1901, p. 587, sec. 57, Judicial Code). *United States v. American Lumber Co.*, 80 *Fed. R.* 309-310.

Held, where the bill did not disclose the absence or non-residence of the defendants the issuance of the subpoena would be dispensed with where the affidavit required by sec. 738, *Rev. Stats.* (*U. S. Comp. Stats.* 1901, p. 587), was filed, but the better practice is to allow the subpoena to be issued and return made. *Ib.* 314.

It is a cardinal principle of jurisprudence that process of a court cannot extend beyond the territorial jurisdiction of the court, and unless expressly authorized by law process issued by a Federal court cannot be served outside the territory over which it has jurisdiction. Sec. 738, *Rev. Stats.* (*U. S. Comp. Stats.* 1901, p. 587), did not authorize the issuance of process to be served beyond the jurisdiction of the court. *Ib.* 311-312.

Held in proceedings under the Act of June 1, 1872, sec. 738, *Rev. Stats.* (*U. S. Comp. Stats.* 1901, p. 587), personal service should be secured when practicable. The order for appearance must be made by the court (in term) upon proper showing on oath. *Bronson v. Keokuk*, 2 *Dill.* 498; *Fed. Cases*, 1,928.

Substituted service invalid without an application to the court setting forth the circumstances requiring it, and an order obtained

from the court directing service be made and that such service when made shall answer as a substitute for actual service on the party represented by the attorney served. *Pacific Railroad v. Missouri, etc., Co.*, 3 *Fed. R.* 772-775.

Substituted service of the subpoena to answer should not be allowed unless on the face of the bill there is merit. *Muhlenburg County v. Citizens N. Bank*, 65 *Fed. R.* 537.

Substituted service is proper where a bill is brought to obtain a new trial of a cause at law in the same court. *Oglesby v. Attrill*, 14 *Fed. R.* 214-215.

Suit to set aside a decree of foreclosure and sale is not a continuation of an original foreclosure suit, and not within the terms of sec. 738, *Rev. Stats.* (sec. 57, *Judicial Code*). *Pacific Railroad v. Missouri, etc., Co.*, 3 *Fed. R.* 772-774.

The principle that no court can acquire jurisdiction over the person of a defendant except by personal service of notice within the jurisdiction or waiver of summons and voluntary appearance is applicable to all courts of justice. *Caledonian Coal Co. v. Baker*, 196 *U. S.* 432-444, 49 L. ed. 545, Oct. T., 1904.

The filing of a petition for removal of a cause to a Federal court, though in general terms, does not amount to a general appearance, but is a special appearance only, and every question, including want of jurisdiction of the person of defendant, may be made and is open for determination in the Federal court. *Wabash W. Ry. v. Brow*, 164 *U. S.* 271-279, 41 L. ed. 435, Oct. T., 1896.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held* whether served with process or not was a question of practice and not of pleading and could not be raised by demurrer. Remedy was by motion to quash. *Robinson v. Nat. Stock Yards Co.*, 12 *Fed. R.* 361.

Whether a defendant had waived the personal privilege of being sued in the proper district could not be ascertained on demurrer. *Ib.* 362.

Loss of the original writ after service does not affect the action; it is discretionary with the court to supply the deficiency. *York and C. R. R. Co. v. Myers*, 18 *How.* 246-253, 15 L. ed. 380.

In proceedings *in rem* the defendant is not bound beyond the particular property; any decree affecting other property is so far void. *Boswell v. Otis*, 9 *How.* 336, 13 L. ed. 336.

A party going into another State under process of a court is exempt from process while necessarily in attendance. *Brooks v. Farwell*, 4 *Fed. R.* 167.

While in another State attending a regular examination of witnesses a party is exempt from process in such State. *Plimpton v. Winslow*, 9 *Fed. R.* 365.

Objections to service of subpoena if not promptly made, deemed waived. *Matthews v. Puffer*, 10 *Fed. R.* 606.

Service of subpoena on a person designated by a fictitious name is void. *Kentucky, etc., Co. v. Day*, 2 *Sawy.* 468; *Fed. Cases*, 7,719.

Appearance does not cure such defect in the writ, or make the appearing person a party. *Ib.*

Moving to dismiss for want of jurisdiction on other grounds is a waiver of objection to being sued in the proper district. *Jones v. Andrews*, 10 *Wall.* 327, 19 L. ed. 935.

A defendant who pleads and puts in an answer waives all objection to the regularity of the service of subpoena. *Goodyear v. Chaffee*, 3 *Blatchf.* 268; *Fed. Cases*, 5,564.

After service and answer, defendant cannot on the hearing object that the bill contains no prayer for service, or that he was not served. *Segee v. Thomas*, 3 *Blatchf.* 11; *Fed. Cases*, 12,633.

A corporation does not waive an objection to the jurisdiction of the court over it by appearing by attorney and pleading to the jurisdiction. *Commercial, etc., Bank v. Slocumb*, 14 *Pet.* 60, 65, 10 L. ed. 354.

Rules 11 to 15 relate principally to matters which may be done as of course with reference to the issue and service of process, and have no universal application to proceedings under the special order of the chancellor. *Gregory v. Pike*, 79 *Fed. R.* 520-521, 25 *C. C. A.* 48.

The return upon the writ must affirmatively show that service was made within the district wherein it was issued. *Allen v. Blunt*, 1 *Blatchf.* 480; *Fed. Cases*, 215.

Held sec. 738, *Rev. Stats. (U. S. Comp. Stats. 1901, p. 587, now sec. 57, Judicial Code)*, was the only statute which authorized service of process in a Federal court upon a defendant outside the district in which the suit is brought. *Winter v. Koon, Schwartz & Co.*, 132 *Fed. R.* 273-274.

NOTE. Sec. 5 of the Act approved July 2, 1890, c. 647, 26 *Stat.* 209 (the Sherman Act) authorizes service of process in suits under it to run into any District throughout the United States.

The issuance of a subpoena against non-residents, and sending it out of the district in which only it could be served and to persons who are without power to serve it is a nullity. *United States v. American Lumber Co.*, 85 *Fed. R.* 827-832, 29 *C. C. A.* 431.

See cases cited under jurisdiction of Federal courts, *ante*, page 415 *et seq.*

A non-resident cannot be enticed into the district where plaintiff resides for the purpose of serving process upon him; if served by such improper means the service is void. *Union Sugar Refinery v. Mathieson*, 2 *Cliff.* 304-309; *Fed. Cases*, 14,398, followed in *Steiger v. Bown*, 4 *Fed. R.* 17-19.

If service cannot be made as required by Rule 13 the court has no power to order service by publication or otherwise. *Hyslop v. Hopcock*, 5 *Ben.* 533; *Fed. Cases*, 6,989 (except in the class of cases prescribed by sec. 738, *Rev. Stats. (U. S. Comp. Stats. 1901, p. 587, sec. 57, Judicial Code)*).

If a judgment at law be obtained by one person against another and an injunction be applied for, a service of subpoena upon the attorney of the plaintiff at law, if his client live out of the State, confers jurisdiction, because the subject in controversy is the same. *Henter v. Suckley*, 2 *Wash. C. C.* 465; *Fed. Cases*, 6,543.

Where defendant sues in equity in the same Circuit (District) Court a non-resident plaintiff at law, to restrain prosecution of the action at law, service of subpoena upon such plaintiff's attorney confers jurisdiction. *Segee v. Thomas*, 3 *Blatchf.* 11; *Fed. Cases*, 12,633; *McDonald v. Seligman*, 81 *Fed. R.* 756.

A bill filed in a Circuit (District) Court of the United States to enjoin a judgment of that court is not considered an original bill but a continuation of the proceeding at law, and the court will not require actual service of subpoena on the defendant if he were a party to the judgment at law. *Minnesota Co. v. St. Paul Co.*, 2 *Wall.* 633, 17 *L. ed.* 886.

Notwithstanding Rules 13 to 15, it is well settled that in ancillary proceedings service may be made on the attorney of record, or on some other agent of the defendant in such proceedings, with the same effect as though made in strict compliance with the rule. This departure

from the usual method involves the exercise of judicial discretion and something on record to support it. Service of process made upon the attorney of the defendant without any order of the court, *Held* void. *Gregory v. Pike*, 79 *Fed. R.* 520, 25 *C. C. A.* 46.

Proceedings original under English Chancery, *Held* ancillary in the Federal courts. *Ib.* 520.

An injunction bill is not considered an original bill between the same parties in the action at law; but if other parties are made in the bill, as to them it is an original bill. *Dunn v. Clarke*, 8 *Pet.* 1-3, 8 *L. ed.* 845.

The practice in ancillary suits to stay proceedings at law, and cross-suits in equity, stated. *Eckert v. Bauert*, 4 *Wash. C. C.* 370; *Fed. Cases*, 4,266; *Ward v. Seabry*, 4 *Wash. C. C.* 426; *Fed. Cases*, 17,161; *Ward v. Seabring*, 4 *Wash. C. C.* 472; *Fed. Cases*, 17,160; *The Cortes Co. v. Tennhauser*, 9 *Fed. R.* 226.

Service upon the president of a non-resident corporation not doing business in the jurisdiction, while temporarily in the district, is a nullity. *Fidelity Trust & S. V. Co. v. Mobile St. Ry. Co.*, 53 *Fed. R.* 850-853, 4 *C. C. A.* 52.

The rule announced in *Ex parte Schollenberger*, 96 *U. S.* 369-377, 24 *L. ed.* 853, and *New England Ins. Co. v. Woodworth*, 111 *U. S.* 138-146, 28 *L. ed.* 379, that a foreign corporation, by doing business in a State other than where incorporated, consents to be "found" there for the purpose of being sued, within the meaning of the Judiciary Act of 1789, and subsequent acts including the Act of Mar. 3, 1875, was abrogated by the Act of 1887, which omitted the clause allowing a defendant to be sued in the district where he is found. *Shaw v. Quincy Mining Co.*, 145 *U. S.* 444-448, 36 *L. ed.* 768.

Congress not having laid down any rule with regard to serving of mesne process upon corporations the State law and practice must be followed. *Amy v. Watertown*, 130 *U. S.* 301, 32 *L. ed.* 946.

Valid service of process may be made upon the agent of a foreign corporation, who voluntarily comes into the jurisdiction of the court upon the business of the corporation which is the subject of the suit in which the service is made. *Premo Specialty Mfg. Co. v. Jersey Creme Co.*, 200 *Fed. R.* 352, 118 *C. C. A.* 458-465.

Service of process upon an officer, agent, or director of a foreign corporation within a State is not of itself sufficient unless the corporation does business or has property within the State or has some designated

agent for the receipt of service. *Reilly v. Philadelphia & R. Ry. Co.*, 109 *Fed. R.* 349-350.

A State statute requiring a foreign corporation, as a condition to obtaining a permit to do business, to authorize service of process on its agent within such State, may subject such corporation to the jurisdiction of a State court, but does not authorize proceeding in contravention of the Act of Congress. *Southern Pacific Co. v. Denton*, 146 *U. S.* 202-209, 36 L. ed. 943.

A corporation, by doing business or appointing a general agent in a district other than that in which it is created, does not waive its right, if seasonably availed of, to insist that the suit should have been brought in the latter district. *In re Keasbey Co.*, 160 *U. S.* 221-229, 40 L. ed. 402.

Where a State statute requires as a condition under which a foreign corporation may do business within the State, that it shall appoint a resident agent therein, authorized to accept service of process in any action or suit pertaining to the property, business or transactions of such corporation within such State, to which such corporation shall be a party, *Held*, that foreign corporations could not be coerced to submit to litigate any controversy which did not pertain to either its property situated within the State, or its business conducted or carried on within the State or to transactions had within the State. *Rutan v. Johnson*, 130 *Fed. R.* 109, 64 *C. C. A.* 443.

To authorize service upon an officer or agent of a foreign corporation, the foreign corporation must actually or substantially be engaged in business within the State, transacted by some agent or manager representing such corporation, and it must appear that the local statute provides for suit against such foreign corporation which has been permitted to transact business within the State. *Buffalo Glass Co. v. Mfg.'s Glass Co.*, 142 *Fed. R.* 273.

Where a corporation has filed with the authorities of the State where incorporated a certificate designating its office and place of business, it is to be deemed a resident of the district within which such place is situated, and cannot be sued in any other district of such State although its business operations extend into other districts. *Weed v. Center & C. St. Ry. Co.*, 132 *Fed. R.* 151-152.

Service on the United States in suits under the Tucker Act of Mar. 3, 1887, c. 359, sec. 6, 24 Stat. 506 (*U. S. Comp. Stat.* 1901, p. 755) by causing a copy of the petition in a cause to be served on the district attorney of the district where suit is brought and mailing a copy by registered

mail to the attorney general is mandatory. *Reed Wrecking Co. v. United States*, 202 *Fed. R.* 314-317.

Personal service of process must be made on an infant in an action involving personal as distinguished from property rights before a Federal court has jurisdiction to appoint a guardian *ad litem* for the infant defendant. *N. Y. Life Ins. Co. v. Bangs*, 103 *U. S.* 435-439, 26 *L. ed.* 582.

Process must be served within the district where the action is brought. *Ib.*

Held in this case that under the former rule the wife could be served with process by leaving a copy with the husband.

RULE XIV—*Alias Subpœna*

Whenever any subpoena shall be returned not executed as to any defendant, the plaintiff shall be entitled to other subpoenas against such defendant, until due service is made.

An amendment of Rule 14 of the Rules adopted March 2, 1842.

RULE XV—*Process, by Whom Served*

The service of all process, mesne and final, shall be by the marshal of the district, or his deputy, or by some other person specially appointed by the court or judge for that purpose, and not otherwise. In the latter case, the person serving the process shall make affidavit thereof.

Same as Rule 15 of the Rules adopted March 2, 1842.

Statutory Provisions

Rev. Stats., sec. 787 *U. S. Comp. Stats.* 1901, p. 608. Duty of the marshal to execute process.

Rev. Stats., sec. 789 *U. S. Comp. Stats.* 1901, p. 609. In case of death of marshal his deputies continue in office and execute the process in the name of the deceased, until another marshal appointed.

Rev. Stats., sec. 790 *U. S. Comp. Stats.* 1901, p. 609. Marshal and deputies when removed, or term expires, may execute process in their hands.

Rev. Stats., sec. 922 *U. S. Comp. Stats.* 1901, p. 686. When the marshal or his deputy is a party in any cause, the writs and precepts shall be directed to such disinterested person as the court or any justice or judge thereof may appoint and the person so appointed may execute and return them.

Decisions

The marshal must make his return at his peril, and any person injured by it has his remedy. *Wortman v. Conyngham*, 1 *Peters C. C.* 241; *Fed. Cases*, 18,056.

If he has doubts as to who is entitled to receive money collected he may pay it into court. The court will not interpose in a summary way to distribute the money or decide the rights of claimants to the fund. *Ib.*

Marshals have same power sheriffs had on the day of the passage of the Act of 1861, sec. 788, *Rev. Stats. (U. S. Comp. Stats. 1901, p. 608)*. *The E. W. Gorgass*, 10 *Ben.* 460; *Fed. Cases*, 4,585.

Under sec. 788, *Rev. Stats. (U. S. Comp. Stats. 1901, p. 608)*, if State laws allow a sheriff to appoint a person to perform a special service, the marshal has like power and his appointee need not be sworn as a deputy. *Hyman v. Chales*, 12 *Fed. R.* 855.

The marshal is liable if he fail to obey the exegit of the writ or violate the rights of others. *Life & F. Ins. Co. v. Adams*, 9 *Pet.* 573-603, 9 *L. ed.* 571.

Marshal liable to extent of injury for failure of deputy to serve process. *United States v. Moore*, 2 *Brock*, 317; *Fed. Cases*, 15,802.

Where the mandate of the writ is to take the person mentioned therein and have him before the court to answer in a plea of debt, a discharge of the debtor and return on the writ "debt and costs satisfied," made by a deputy upon payment of the amount of the debt, is not an official act and the return does not prevent further steps authorized by law. *Ib.*

The marshal on an ordinary process *in personam* containing a clause directing the marshal in case the defendant could not be found to attach goods and chattels thereof returned, that defendant not having been found, he had attached property; upon no showing of collusion or fraud, *Held*, the return should stand and the marshal left to justify it in an action for a false return, if it was claimed he failed to make proper effort to serve the defendant. *Harriman v. The Rockaway, etc., Co.*, 5 *Fed. R.* 461.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held* a plea was bad which traversed the return of the marshal in the same cause. *Von Roy v. Blackman*, 3 *Woods*, 98; *Fed. Cases*, 16,997.

Parties in the same case cannot question the marshal's return, even though it involves an opinion. *Ib.*

The power of the court to permit its officers to amend their returns is liberally exercised in the interest of justice, where rights of third parties not affected. *Phoenix Ins. Co. v. Wulf*, 1 *Fed. R.* 775-778.

A return of process by a deputy in his own name as deputy, if served by him, good. *Spafford v. Goodell*, 3 *McLean*, 97; *Fed. Cases*, 13,197.

Marshal is bound to serve the process as soon as he reasonably can. *Kennedy v. Brent*, 6 *Cr.* 187, 3 L. ed. 194.

The subpoena, though not in form, is, in effect, process, directed to the marshal. *Wenter v. Iowa, etc., R. Co.*, 2 *Dill.* 487; *Fed. Cases*, 17,890.

The power of the court to direct that a person other than the marshal serve the subpoena is not limited but discretionary. *Ib.*

An attachment being process of the court must be served by the marshal (or by his deputy or some other person appointed by the court). *United States v. Montgomery*, 2 *Dall.* 335, 1 L. ed. 404.

As soon as the marshal seizes goods, under proper process of the court, he is entitled to the sole and exclusive custody thereof, subject to the future orders of the court. *Ex parte Hoyt*, 13 *Pet.* 279-290, 10 L. ed. 161.

Where a deputy marshal is a party to the suit; quære, whether he may plead in abatement that process was not served on him by a disinterested person. *Knox v. Summers*, 3 *Cranch*, 496.

RULE XVI—*Defendant to Answer—Default—Decree Pro Confesso*

It shall be the duty of the defendant, unless the time shall be enlarged, for cause shown, by a judge of the court, to file his answer or other defense to the bill in the clerk's office within the time named in the subpoena as required by Rule 12. In default thereof the plaintiff may, at his election, take an order as of course that the bill be taken *pro confesso*; and thereupon the cause shall be proceeded in *ex parte*.

A substitute for Rules 17 and 18 of the Rules adopted March 2, 1842

Decisions

Irvine v. Lowry, 14 *Pet.* 293-299, holding that an appearance in a State court to remove is a waiver of objection to jurisdiction, overruled by *Wabash Ry. v. Brow*, 164 *U. S.* 271-279, 41 L. ed. 431.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held* where a defendant appeared by motion, to object to the

jurisdiction of the court over his person, and at the same time asked that the cause be dismissed because the court had no jurisdiction over the subject-matter of the suit, this constituted a voluntary appearance. *Fitzgerald v. Fitzgerald*, 137 U. S. 98-106, 34 L. ed. 608.

The Circuit Court for the Ninth Circuit provided by Rule 22 that the party appearing specially should state in writing that his appearance is special, "and that if the purpose for which such special appearance is made will not be sanctioned or sustained by the court, he will appear generally in the cause," and that if such statement be not made, "the appearance shall be deemed and treated as a general appearance," *Held*, that the court had power to make this rule, under sec. 918, *Rev. Stats. (U. S. Comp. Stats. 1901, p. 685)*, authorizing the Circuit Court to make rules not inconsistent with the law and rules prescribed by the Supreme Court. *Mahr v. Union Pacific R. Co.*, 140 *Fed. R.* 921-925.

Whenever a litigant appears in a cause to deny jurisdiction over his person, which would otherwise exist but for the failure to pursue the methods prescribed by law for bringing him into court, he must confine himself to the suggestion that the summons or notice, as the case may be, required by law to be served has not been served, and that the court is therefore without jurisdiction in the absence of such service. If he enters into the question of whether the court has jurisdiction over the subject-matter of the suit in a transitory action, and challenges that point, he waives the want of service, and enters voluntarily into a controversy which goes to the merits, and thereby submits to the jurisdiction of the court over his person. *Ib.* 923.

Under the rules in force prior to the revision promulgated November 4, 1912, in a suit to enforce a lien, etc., affecting property within the district, under sec. 738, *Rev. Stats. (U. S. Comp. Stats. 1901, p. 587)*, as re-enacted by sec. 8 of the Act of Mar. 3, 1875, c. 137, 18 *Stat. L.* 472 (sec. 57 Judicial Code), where there was no service of process upon the defendant within the jurisdiction, but the defendant appeared "specially and solely for the purpose of objecting to the jurisdiction of the court," and moved to dismiss the suit upon grounds which related mainly to the merits of the case, which was overruled, and afterward filed a demurrer raising the question of jurisdiction, *Held*, that such appearance did not amount to a general appearance, and that the defendant was still an "absent defendant, without appearance," within the meaning of those words in the Act of Mar. 3, 1875. *York County Savings Bank v. Abbott*, 139 *Fed. R.* 988-990.

Held, further, that as the defendant first appeared to move to dismiss and the motion to dismiss was refused, the subsequent appearance by defendant on demurrer, in which demurrer the defendant also stated the appearance to be special without waiver of objection to the jurisdiction before taken by motion to dismiss, could not be regarded

as voluntary, but forced by the refusal to dismiss; that the appearance was not an appearance within the meaning of the 8th sec. of the Act of Mar. 3, 1875, and that all questions of jurisdiction which might have been raised under the motion to dismiss were still available. *Ib.*

An answer by stockholders, even where permitted by the court, is not the answer of the corporate body, and if a defendant corporation fails to answer under its common seal the complainant is entitled to enter an order that the bill be taken *pro confesso*. *Bronson v. La Crosse R. Co.*, 2 *Wall.* 283-302, 17 L. ed. 725.

A decree *pro confesso* taken before the expiration of the time to answer is irregular and will be set aside on motion. *Fellows v. Hall*, 3 *McLean*, 487; *Fed. Cases*, 4,723.

A decree *pro confesso* for want of an answer is irregular where process was not served twenty days before the return-day, and if final decree has been entered the court on motion will set it aside. *Treadwell v. Cleveland*, 3 *McLean*, 283; *Fed. Cases*, 14,155.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held* the term "*ex parte*" under the rule did not mean without notice to a party who had appeared in the cause. After a final decree, upon a decree *pro confesso*, motion to set aside the decree was granted because no notice of application for such decree was given defendant. *Bennett v. Hoefner*, 17 *Blatchf.* 341; *Fed. Cases*, 1,320. See *Frow v. De La Viga*, 15 *Wall.* 552, 21 L. ed. 60, *contra*. Also *Austin v. Reilly*, 55 *Fed. R.* 833-837.

To suppress an answer of parties defendant for contempt and after so doing to render a decree *pro confesso* for want of answer is beyond the power of the court; the decree is void for want of jurisdiction and may be collaterally attacked. *Hovey v. Elliott*, 167 *U. S.* 409-444, 42 L. ed. 212.

The decree *pro confesso* is only *nisi*. Under the rules adopted in 1822 it was not made absolute until the succeeding term. *Pendleton v. Evans's Extx.*, 4 *Wash. C. C.* 337; *Fed. Cases*, 10,920.

Under equity practice before the adoption of rules, where an injunction had been issued upon substituted service upon defendant's attorney, in an action at law five years before, *Held*, irregular to order the bill taken *pro confesso* without an appearance or an attachment. *Read v. Consequa*, 4 *Wash. C. C.* 174; *Fed. Cases*, 11,606.

Held that by the uniform rule of equity practice the defendant should take the court's leave to enter a special appearance to make objection

to the court's jurisdiction over his person which was never granted, except upon an undertaking contained in the order, that the defendant would submit without further process to the orders of the court if the point should be decided against him. *Romaine v. Union Ins. Co.*, 28 *Fed. R.* 625-630.

The English Chancery practice is gone into with an extended citation of cases. *Ib.*

A party loses no rights by pleading to the merits as required after saving his rights by proper objection. *Merchants, etc., Co. v. Clow*, 204 *U. S.* 286-289, 51 L. ed. 489; *So. Pacific v. Disston*, 146 *U. S.* 202, 36 L. ed. 943.

The right to object to the illegality of service of process by special appearance is not waived by answering upon the merits after the objection is overruled. *Harkness v. Hyde*, 98 *U. S.* 476-479, 25 L. ed. 237.

In the early practice, *Held*, that where a defendant might have appeared "*in propria persona*" and pleaded an abatement, if he appears by attorney all irregularity of process is cured. *Knox v. Summers*, 3 *Cranch*, 496-498, 2 L. ed. 510.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held* a general appearance cured any defect in the service of process. *Farrar v. United States*, 3 *Pet.* 459-460, 7 L. ed. 741.

A general appearance waives any objection to the suit founded on the defendant's residence in another district. *Taylor v. Longworth*, 14 *Pet.* 172-174, 10 L. ed. 406.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held* where a defendant who was not compelled to appear and did not appear was a necessary party, the other defendants who had answered the bill might move for a dismissal and might have the bill dismissed for non-prosecution. *Pickett v. Swann*, 5 *Mason*, 561; *Fed. Cases*, 11,135.

An appearance subsequent to judgment cannot impart validity to an anterior judgment otherwise void. *Dorr v. Giboney*, 3 *Hughes*, 382; *Fed. Cases*, 4,006.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held* where an attorney appeared generally for the defendant and afterwards withdrew such withdrawal did not deprive the plaintiff of the benefit of the appearance in curing defects in the former proceedings. *Creighton v. Kerr*, 20 *Wall.* 8, 22 L. ed. 309.

The appearance is not withdrawn, although the attorneys by whom it was entered are withdrawn. *Ib.*

By the withdrawal of a plea, the defendant is not out of court. *Eldred v. Bank*, 17 *Wall.* 551.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held* the time of appearance of defendant might be extended by order of the court to prevent injustice. *Poultney v. Lafayette*, 12 *Pet.* 472, 9 L. ed. 1161.

Where a corporation sued under a wrong name voluntarily appears, no objection can be taken to the decree for want of process. *Virginia, etc., Co. v. United States*, *Taney*, 418; *Fed. Cases*, 16,973.

By appearing, it admits the wrong name to be its true name, and under that name becomes a party to the suit. *Ib.*

One who files an intervening petition thereby submits himself to the jurisdiction of the court. *President, etc., Bowdoin College v. Merritt*, 59 *Fed. R.* 6.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held* when a defendant did not reside in the State where suit was brought, but was served with process there, he might plead the matter in abatement. If he did not plead it in abatement, he could not afterwards set it up unless it appeared on the face of the bill. *Searles v. J. P. & M. R. Co.*, 2 *Woods*, 621; *Fed. Cases*, 12,586.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held* a court of equity should, at any time before entry of default, refuse to permit a bill to be taken for confessed, if defendant appeared and tendered his answer. *Haldeman v. Haldeman*, *Hemp.* 407; *Fed. Cases*, 5,908. Decided under Rule 18 of the Rules adopted in 1822.

Under the 17th Rule adopted in 1822 before a bill could be taken for confessed, defendant must have been ruled to answer. *Ib.*

Under the rules in force prior to the revision promulgated November 4, 1912, *Held* old Rule 18 required the defendant to plead by the next rule-day after appearance, which was the same as if a special rule were taken on him to do so. *O'Hara v. McConnell*, 93 *U. S.* 150-154, 23 L. ed. 843, Oct. T., 1876.

RULE XVII—*Decree Pro Confesso to be Followed by Final Decree—Setting Aside Default*

When the bill is taken *pro confesso* the court may proceed to a final decree at any time after the expiration of thirty

days after the entry of the order *pro confesso*, and such decree shall be deemed absolute, unless the court shall, at the same term, set aside the same, or enlarge the time for filing the answer, upon cause shown upon motion and affidavit. No such motion shall be granted, unless upon the payment of the costs of the plaintiff up to that time, or such part thereof as the court shall deem reasonable, and unless the defendant shall undertake to file his answer within such time as the court shall direct, and submit to such other terms as the court shall direct, for the purpose of speeding the cause.

Substantially the same as Rule 19 of the Rules adopted March 2, 1842.

Decisions

A decree *pro confesso* is not a decree as of course according to the prayer of the bill, nor merely such as the complainant chooses to take, but according to what is proper to be decreed upon the statements of the bill assumed to be true.

A confession of facts properly pleaded dispenses with proof of those facts and is as effective for the purposes of the suit as if the facts were proved; and a decree *pro confesso* regards the statements of the bill as confessed. *Thompson v. Wooster*, 114 U. S. 104-110, 29 L. ed. 105, Oct. T., 1884.

A final decree based on a decree *pro confesso* is binding and conclusive and cannot be impeached collaterally, but only on a bill of review, or a bill to set aside for fraud.

In an infringement suit where a decree *pro confesso* is entered for want of an answer, and the cause is referred to a master for an accounting, the only question before the master is the amount of damages and profits. *Reedy v. Weston El. Co.*, 83 Fed. R. 709-711, 28 C. C. A. 27.

Upon a decree *pro confesso* entered for want of an answer the only question on appeal is whether the allegations of the bill are sufficient to support the decree. *Masterson v. Howard*, 18 Wall. 99, 21 L. ed. 764.

The only effect of a decree *pro confesso* is to enable the case to be proceeded with *ex parte*. Unless followed by a final decree it settles no rights. *Lockhart v. Horn*, 3 Woods, 542; *Fed. Cases*, 8,446.

Where a case for relief is made in the bill it may be given by imposing conditions on the complainant consistent with the rules of equity,

in the discretion of the court. *Walden v. Bodley*, 14 *Pet.* 156-164, 10 L. ed. 398.

Under old Rule 20, promulgated in 1822, no service of any copy of an interlocutory decree *pro confesso* was necessary before final decree. *Bank v. White*, 8 *Pet.* 262, 8 L. ed. 938.

If one of several defendants make default, a decree *pro confesso* may be entered as to the party in default, but no final decree can be entered on the merits until the case is disposed of as to the other defendants, and if on the hearing the plaintiff fails to sustain his case the bill will be dismissed as to all. *Frow v. De La Viga*, 15 *Wall.* 552-554, 21 L. ed. 60.

The defaulting defendant is simply out of court and cannot take any further part in the cause. *Ib.*

In such case if the bill be dismissed on the merits, it will be dismissed as to the defendant in default as well as the others. *Ib.*

The defaulting defendant will not be entitled to service of notices in the cause, nor to appear in it in any way. He cannot be heard at the final hearing. *Ib.*

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, where defendant had appeared he had a right to be heard as to the form of the final decree, and such questions as could be presented upon the pleadings and proofs, even after a decree *pro confesso*. *Southern Pac. R. Co. v. Temple*, 59 *Fed. R.* 17-19.

A decree entered pursuant to an order *pro confesso* on a cross-bill is interlocutory, and may be reconsidered, modified, or set aside at a subsequent term. *Blythe v. Hinckley*, 84 *Fed. R.* 228.

A decree entered pursuant to an order *pro confesso* on a cross-bill will be set aside where there are serious irregularities in the service of subpoena on the cross-bill, which was amended after the decree *pro confesso* and the final decree. *Ib.*

No final decree upon the whole case can be entered pursuant to an order *pro confesso* on a cross-bill, while there is pending an undetermined motion to dismiss the original suit for want of jurisdiction. *Ib.*

Under the rules in force prior to the revision promulgated November 4, 1912, *Held* a decree absolute might be entered after a decree *pro confesso* entered in disregard of a demurrer filed, lacking the certificate of counsel and affidavit required by Rule 31. *Sheffield Furnace Co. v. Withrow*, 149 *U. S.* 574, 37 L. ed. 853.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, the decree *nisi* was made absolute at or after the next

succeeding rule-day. *O'Hara v. MacConnell*, 93 *U. S.* 150-153, 23 L. ed. 840.

It is within the discretion of a court of equity upon a proper showing to set aside a decree *pro confesso* upon such terms as it may see fit to prescribe. *French v. Hay*, 22 *Wall.* 238-248, 22 L. ed. 801.

Laches may prevent the setting aside of a decree *pro confesso*. A petition to vacate the decree should be made at the earliest practicable moment. *Comly v. Buchanan*, 81 *Fed. R.* 58.

A decree *pro confesso* irregularly entered will be set aside on motion as of course. *Fellows v. Hall*, 3 *McLean*, 281; *Fed. Cases*, 4,722.

A final decree on a decree *pro confesso* cannot be vacated at a subsequent term, no application to vacate or modify having been made at the term at which rendered. *Stuart v. City of St. Paul*, 63 *Fed. R.* 644.

If the court in its discretion by order enlarge the time to answer, and afterwards proceed to a final decree without a compliance with its order, because of defendant's omission, it will not be error for which a bill of review will lie, but an irregularity to be redressed on motion, while the court retains power over the decree. *Bank v. White*, 8 *Pet.* 262-269, 8 L. ed. 938.

After a decree *pro confesso* the defendant will not be allowed on appeal to question the sufficiency or amount of evidence, but is not precluded from contesting the sufficiency of the bill or from insisting its averments do not justify the decree. If averments are indefinite or complainant's demand is in its nature uncertain proof must be adduced. *Ohio Central R. Co. v. Central Trust Co.*, 133 *U. S.* 83, 33 L. ed. 563.

If the allegations are distinct and positive they may be taken as true without proof; if they are indefinite or the demand of the complainant is in its nature uncertain, the requisite certainty must be afforded by proof. On appeal the defendant is not precluded from contesting the sufficiency of the bill, or insisting that its averments do not justify the decree. If a decree is not confined to the matter of the bill, it may be attacked on appeal. *Ohio Central Ry. Co. v. Central Trust Co.*, 133 *U. S.* 83-90, 33 L. ed. 563, Oct. T., 1889.

On a petition of defendant setting up that plaintiff had deceived him into failing to defend, that he had a meritorious defense and praying leave to file an answer and to have the decree *pro confesso* set aside, *Held* the petition was properly denied. *McMickin v. Perin*, 18 *How.* 507, 15 L. ed. 506.

In equity the court has a discretion as to the costs, and may impose them all upon one party or may divide them in such manner as it sees fit. *Kittredge v. Race*, 92 U. S. 116-121.

RULE XVIII—*Pleadings—Technical Forms Abrogated*

Unless otherwise prescribed by statute or these rules the technical forms of pleadings in equity are abolished.

A new rule promulgated November 4, 1912.

RULE XIX—*Amendments Generally*

The court may at any time, in furtherance of justice, upon such terms as may be just, permit any process, proceeding, pleading or record to be amended, or material supplemental matter to be set forth in an amended or supplemental pleading. The court, at every stage of the proceeding, must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

A new rule promulgated November 4, 1912.

Statutory Provisions

Defects in matter of form shall be disregarded in all courts of the United States. The court may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall in its discretion and by its rules prescribe. *Rev. Stats.*, sec. 954, *U. S. Comp. Stats.* 1901, p. 696.

Decisions

No rule can be laid down in reference to amendments of equity pleadings that will govern all cases. This must depend upon special circumstances in each case. *Hardin v. Boyd*, 113 U. S. 756, 28 L. ed. 1141.

In passing upon applications to amend, the ends of justice must not be sacrificed by too rigid adherence to technical rules of practice. *Ib.*

Amendments are only allowed where the bill is defective in its prayer for relief, or in proper parties, or in the statement of facts or circumstances connected with the substance of the case, but not forming the substance of it. *Ib.* 761.

Amendments are only allowed where upon the case made by the bill, plaintiff is entitled to relief, though different from that sought by the prayer. *Ib.*

Amendments in chancery are within the provisions of the statute of 1789 upon the subject of jeofails. *Chemments v. Moore*, 6 Wall.

299-311, 18 L. ed. 786; *Clarke v. Mathewson*, 12 *Pet.* 164-172, 9 L. ed. 1041.

See sec. 954, *Rev. Stats.* (*U. S. Comp. Stats.* 1901, p. 696).

There are cases in chancery where amendments are permitted at any stage of the cause, as where an essential party has been omitted. *Walden v. Bodley*, 14 *Pet.* 156-160, 10 L. ed. 398.

Amendments which change the character of the bill or answer, so as to make substantially a new case should rarely, if ever, be allowed after the case has been set for hearing. *Ib.*

Federal courts of equity are indulgent in allowing amendments of pleadings in matters of form, but slow to allow amendments in matters of substance. *Schultz v. Phenix Ins. Co.*, 17 *Fed. R.* 376-390.

Where the affidavit in support of the motion to file an amended answer fails to show that the new facts have come to the knowledge of the respondent since the original answer was prepared, the amendment may be denied. *Ib.*

Under the rules in force prior to the revision promulgated November 4, 1912, *Held* no material fact occurring after the filing of the bill could be introduced by amendment. If it was done it was cause for demurrer. *Copen v. Fleischer*, 1 *Bond*, 440; *Fed. Cases*, 3,211.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, new matter could not be added to the bill by special replication, but must be by amended bill or by supplemental bill. *Duponti v. Mussy*, 4 *Wash. C. C.* 128; *Fed. Cases*, 4,185.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, an amendment was of course, where objection to the jurisdiction had been sustained, but there had been no general appearance or plea, demurrer or answer filed. *Insurance Co. v. Svendsen*, 74 *Fed. R.* 346-347.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, after a cause had been decided in favor of the defendant upon a demurrer filed, the court had power to allow an amendment of the bill, but should exercise its discretion cautiously on applications of this nature. *Hunt v. Rausmanier*, 2 *Mason*, 342; *Fed. Cases*, 6,898.

This principle is supported by the Act of 1789 (sec. 954, *Rev. Stats.*, *supra*, *U. S. Comp. Stats.* 1901, p. 696). *Ib.*

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, the complainant was not entitled as a matter of right to amend his bill after the demurrer had been sustained, but the court, in its discretion, might grant him leave to amend upon terms. *National Bank v. Carpenter*, 101 *U. S.* 567-568, 25 L. ed. 815.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, old Rule 35 did not give complainant an absolute right to amend; after demurrer sustained it was left in the discretion of the court to be exercised for the promotion of justice. *Held*, the abuse of this discretion must be plain to warrant a review in an appellate court. *United States v. Atherton*, 102 U. S. 372-375, 26 L. ed. 213; *Natl. Bank v. Carpenter*, 101 U. S. 567-568, 25 L. ed. 815.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, it was improper upon a single demurrer, to sustain a bill in part and overrule it in part; yet where this was done and the defendant answered the bill as amended, both parties were deemed to have waived the objection. *Marshall v. Vicksburg*, 15 Wall. 146-149, 21 L. ed. 121.

The right to amend may be lost by delay in moving to amend. *Edward P. Allis Co. v. Withlacoochee L. Co.*, 105 Fed. R. 680-682.

Leave to amend may be refused because of laches in applying. *Jones v. Welling*, 16 Fed. R. 655.

The averments of citizenship of a party may be amended at any stage of the cause if the amendment is asked in a reasonable time after the defect is suggested. *Fisher v. Rutherford*, *Bald.* 188; *Fed. Cases*, 4,823.

The staleness of a demand, or the want of proper parties, is no objection to the amendment of a bill. *Ib.*

If the bill states facts to entitle the plaintiff to relief, the court will allow it to be amended even if it be an appeal, and will remand the cause for this purpose. *Lewis v. Darling*, 16 How. 1, 14 L. ed. 819.

A defect in the bill that a party has been joined who has no interest in the suit may be cured by amendment, which can be directed at the instance of the court, and even on appeal. *Hubbard v. Manhattan Trust Co.*, 87 Fed. R. 51-57, 30 C. C. A. 520.

Where the case is not properly prepared for final decree, the appellate court may direct that the decree be reversed, and the cause remanded, with leave for the plaintiff to amend the bill. *Estho v. Lear*, 7 Pet. 130-131, 8 L. ed. 633.

Where the record upon the bill and answer is so deficient that the court is unable to make a decree, the appellate court may order a reversal, with directions for the requisite amendments. *Harrison v. Nixon*, 9 Pet. 483-505, 9 L. ed. 201, Mr. Justice Baldwin dissenting.

The power to amend exists in the appellate court, as well as in the court where the proceeding has been had, and in the appellate court defects in matter of form are not to be regarded as error. *Smith v. Jackson*, 1 *Paine*, 486; *Fed. Cases*, 13,065.

Defects in substance cannot be amended in an appellate court. They may be amended in the trial court on terms before final judgment or decree. *Ib.*

An amendment must be made, where although all the parties are before the court, the rights of the persons present are so involved, that complete and final justice cannot be done between the parties to the suit without affecting those of some absent party. *Shields v. Barrow*, 17 *How.* 130-141, 15 L. ed. 158.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, after the final decree, an amendment of the pleadings to meet objections raised long before the decision was rendered, should not be allowed. *Blair v. Harrison*, 57 *Fed. R.* 257, 6 *C. C. A.* 326.

If a contract be set out in substance but not in exact terms, an amendment on easy terms will be allowed to cure any variances. Where the contract proved, varied essentially from that set out in the bill, and would have proved fatal without an amendment, it was held that an amendment should be allowed the plaintiff, who otherwise had merits, and that such amendment might even be allowed after decree. *Tufts v. Tufts*, 3 *Woodb. & M.* 456; *Fed. Cases*, 14,233.

An amendment which changes the character of the bill may be allowed after final decree, if the cause has been tried as it would have been had the bill originally been in the amended form, where such amendment introduced no new cause of action. *The Tremolo Patent*, 23 *Wall.* 518, 23 L. ed. 97.

A court of equity has power to adapt its proceedings to the exigencies of each particular case, and this power would often be ineffectual unless it also possessed the power, after a cause has been heard and the case for relief made out but not the case disclosed by the bill, to allow an alteration of the bill, on terms that the party not in fault could have no reasonable ground to object to. *Neale v. Neales*, 9 *Wall.* 1-9, 19 L. ed. 590.

Before the hearing the court's discretion is controlled by the rules of equity proceedings adopted by the Supreme Court, but not so upon the hearing, for there is no rule on the subject of amendments applicable to a cause which has advanced to this point; therefore an amendment at the hearing is in the discretion of the court. *Ib.* 9.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, it was error to strike from the files an amendment to a bill, which explained the delay in bringing suit, and was an answer to the charge of laches, upon which a demurrer had been sustained. *Laut v. Manley*, 75 *Fed. R.* 627, 21 *C. C. A.* 457.

A bill may be amended upon the hearing of an application for a preliminary injunction to supply a defective statement of parties, who have been served with notice and contested the motion, and the amendment becomes effective at once for the purpose of the hearing. *American Steel & W. Co. v. Wire Drawers, etc., Union*, 90 *Fed. R.* 598.

The amendment of a bill, on which an injunction has been granted, will not affect the injunction granted on the original bill. *Reed v. Consequa*, 4 *Wash. C. C.* 174; *Fed. Cases*, 11,606.

New process is not necessary upon an amended bill as to defendants already before the court. *French v. Stuart*, 22 *Wall.* 238, 22 *L. ed.* 854.

An amended bill should state only so much of the original bill as may be necessary to make intelligible the new matter. *Pirree v. West*, 3 *Wash. C. C.* 354; *Fed. Cases*, 10,910.

The amended bill should call upon the original defendants to answer it, and upon the new defendants to answer both that and the original bill. *Ib.*

It is more proper to file an amended bill than to interline the original. *Ib.*

If an unnecessary party is joined, over whom the court has no jurisdiction, objection to the jurisdiction may be cured by amendment. *Conolly v. Taylor*, 2 *Pet.* 556-565.

Matters existing at the time of the filing of the bill, necessary to the case but omitted therefrom, should be brought in by amendment. If arising after the bill is filed, by a supplemental bill. *Swatzel v. Arnold*, 1 *Woolw.* 383; *Fed. Cases*, 13,682.

If an amendment in effect make a new case or one inconsistent with the position of the complainants in the suit at law, where they are seeking a new trial, it will be stricken from the files on motion. *Oglesby v. Attrill*, 14 *Fed. R.* 214-215.

A bill by way of supplement and amendment making an essential change in the character of the original suit may not be filed after the original bill has been argued and is under advisement. *Snead v. McCoull*, 12 *How.* 407-422, 13 *L. ed.* 1043.

Especially where not accompanied by evidence, in an affidavit or

otherwise, to show the amendments could not have been made part of the original bill. *Ib.* 422.

Where a cause has been dismissed for want of jurisdiction, the bill cannot be amended and the cause restored. *Jackson v. Ashton*, 10 *Pet.* 480, 9 L. ed. 502.

After the announcement of the final decision of the court upon the merits, it is proper to refuse to permit an amendment to meet objections which were raised at the hearing two months before the decision was rendered. *Claffin v. Bennett*, 51 *Fed. R.* 693.

An amendment cannot be allowed which substitutes a new plaintiff as the owner of the subject-matter of the suit. So held where "A" brought suit for infringement of patent and afterward sought to amend by adding "C" as plaintiff, alleging "C" to be the exclusive owner of the patent right. *Goodyear v. Bourn*, 3 *Blatchf. C. C.* 266; *Fed. Cases*, 5,561.

In a suit for infringement of patent, after decree and accounting, a motion for amendment on the ground that the admissions of the answer were by mistake, will be denied. *Ruggles v. Eddy*, 11 *Blatchf.* 524; *Fed. Cases.* 12,118.

The granting or refusing leave to file an amended bill or plea is a matter within the discretion of the trial court, and will not be reviewed in an appellate court unless there has been gross abuse of this discretion. *Chapman v. Barney*, 129 *U. S.* 677-681, 32 L. ed. 800; *Gormley v. Bunyan*, 138 *U. S.* 623-631, 34 L. ed. 1086.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, the fact that a demurrer was sustained to a bill which made a good case upon a defective statement, and the bill amended by leave did not change the fact of jurisdiction of the *res* as the amendments related back to and became part of the original bill, and *Held* a later suit in a State court would not acquire jurisdiction because of the defective allegations cured by amendment. *Gaylor v. Ft. Wayne, etc., R. Co.*, 16 *Biss.* 286; *Fed. Cases*, 5,284.

Where between the date of filing the bill and its amendment suit was instituted in the State court and a receiver appointed it did not result that the Federal court lost jurisdiction of the *res* and was required to yield its jurisdiction. *Ib.*

After filing an answer defendant may, by leave, file a supplemental answer to set up new matter come to his knowledge since filing the original answer. *Caster v. Wood*, *Bald.* 289; *Fed. Cases*, 2,505.

If the facts were known to the party when the original answer was filed and omitted through mistake, leave to file a supplemental answer may be refused. *Suydam v. Truesdale*, 6 *McLean*, 459; *Fed. Cases*, 13,656.

If amendments are made without obtaining leave and are not objected to, the want of leave will be waived. *Clemments v. Moore*, 6 *Wall*. 299-311, 18 L. ed. 786.

The omission to obtain leave to amend is within the statute of jeofails (Sept. 24, 1789, sec. 954, *Rev. Stats.*, *U. S. Comp. Stats.* 1901), p. 696. *Ib.* 311.

An objection to an amendment of a bill in chancery because not filed with the leave of the court cannot first be made on appeal. *Ib.*

The leave to amend may be without notice to the defendant. *In re Sanford Fork & Tool Co.*, 160 *U. S.* 247-256, 40 L. ed. 416, Oct. T., 1895.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, under the rules prescribed for the Circuit Courts upon the coming in of defendant's answer, four courses were open to complainant. (1) He might upon motion have leave to amend with or without costs as the court might direct, Rules 29 and 45. (2) He might file exceptions to the answer for insufficiency, Rule 61. When if an amended answer was not filed the exceptions should be set for hearing, Rule 63. If the exceptions were allowed a complete answer must be put in, or so far as the exceptions were concerned the bill might be taken as confessed. (3) If the answer was not excepted to, or was deemed or adjudged sufficient, a general replication might be filed, which put the cause at issue, Rule 66. Or (4) the cause might be set for hearing upon bill and answer, Rule 41. *Ib.* 256-257.

When the cause was set down on bill and answer, all the facts alleged in the bill and not denied in the answer, as well as all new facts alleged in the answer were deemed admitted, as upon a demurrer to an answer at law. *Ib.* 257.

Where the proofs in a cause show a case not put in issue by the pleadings, an amendment will be permitted which shall bring the proofs and the real case before the court. *Calloway v. Dobson*, 1 *Brock*. 119; *Fed. Cases*, 2,325.

An amendment will not be permitted after the opinion of the court and the testimony have indicated in what respect the answer may be modified, to effect as testimony such a change in the answer as will defeat the justice of the case. *Ib.*

No amendment is necessary when in a suit on a different cause of action a judgment in a prior suit can be used in evidence to support the construction of the complainants but cannot be pleaded as an absolute

bar arising on the face of the records. *So. Pacific Ry. v. The United States*, 168 *U. S.* 57, 42 L. ed. 380.

At the hearing of a cause, even upon appeal, an order may be made for the cause to stand over, with liberty to plaintiff to amend by adding proper parties, if it appear he is entitled to relief, but it cannot be given for want of proper parties. *Lewis v. Darling*, 16 *How.* 1-8, 14 L. ed. 822.

Where on a bill to cancel a sheriff's deed for fraud containing the usual prayer for other relief, but no offer to pay the execution debt on which the property was sold, the cause was heard on pleadings and proofs, the court held the case was not one for cancellation of the deed but for redemption and gave leave to amend the bill on judgment of costs and reasonable counsel fees. *Held* as the prayer might have been in the alternative, the amendment was proper. *Graffam v. Burgess*, 117 *U. S.* 180, 29 L. ed. 844.

It will be noted the defendants were allowed to file a new answer after the amendment of the prayer of the bill. *Ib.*

RULE XX—*Further and Particular Statement in Pleading may be Required*

A further and better statement of the nature of the claim or defense, or further and better particulars of any matter stated in any pleading, may in any case be ordered, upon such terms, as to costs and otherwise, as may be just.

A new rule promulgated November 4, 1912.

Decisions

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, the rule that a bill should contain a clear and explicit description sufficient to give the defendant notice of the subject-matter of the complaint against him was not abrogated by old Rule 26. *Electro Libration Co. v. Jackson*, 52 *Fed. R.* 773-776.

The bill should give the requisite full information of itself. Where for convenience exhibits are allowed, the bill should contain explicit reference to them. *Ib.*

Pleadings in equity are viewed without regard to form, and exceptions are never allowed if made under circumstances calculated to effect a surprise on either party. *Surget v. Byers*, *Hemp.* 715; *Fed. Cases*, 13,629.

Any defect in the statements made in the bill is rendered immaterial by setting out the facts in the answer. *Cavender v. Cavender*, 114 *U. S.* 464-471, 29 L. ed. 212.

RULE XXI—*Scandal and Impertinence*

The right to except to bills, answers, and other proceedings for scandal or impertinence shall not obtain, but the court may, upon motion or its own initiative, order any redundant, impertinent or scandalous matter stricken out, upon such terms as the court shall think fit.

A substitute for Rule 26 of the Rules adopted March 2, 1842.

Decisions

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, old Rule 26 did not curtail the inherent power of the court to strike out rambling or tautological pleadings, or purge the record of scandalous, or impertinent matter, on its own motion, in the absence of exceptions. *Kelly v. Boettcher*, 85 *Fed. R.* 55-57.

Scandal in pleading consists of any unnecessary allegations bearing cruelly on the moral character of an individual, or in stating anything contrary to good manners, or anything unbecoming the dignity of the court. *Ib.*

The statement of immaterial facts is impertinence because they have no relation to the issues to be decided. Statement of matters of law is impertinence because the court takes judicial notice of the law and its statement is unnecessary. *Ib.*

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, when the court of its own motion struck from its files a bill as scandalous or impertinent, it might allow a new bill, not exceeding a prescribed length, to be filed as of the date of the original filing. *Ib.* 55.

Immaterial and scandalous parts of an answer will not be stricken out if intended to meet charges of bad faith made in the bill. *Mercantile Trust Co. v. Missouri, K. & T. R. Co.*, 84 *Fed. R.* 379.

Impertinence is any matter not relevant to a point properly before the court for a decision at any stage of the cause. *Wood v. Mann*, 1 *Sumner*, 578; *Fed. Cases*, 17,952.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, allegations of an answer which set up no fact, but which were simply an argument as to the effect of facts alleged in the bill, were impertinent, and should be stricken out on exception. *Fla. Mtg. & Inv. Co. v. Finlayson*, 74 *Fed. R.* 671-674.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, on exceptions for impertinence, the pleadings would be given a liberal construction, having regard to the nature of the case. *Griswold v. Hill*, 1 *Paine*, 390; *Fed. Cases*, 5,835.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, exception for impertinence would not be allowed unless it was clear that the matter excepted to could not be material to plaintiff's case. *Wells v. Oregon Ry. & N. Co.*, 15 *Fed. R.* 561-563.

Material matters are not necessarily impertinent because such, as the court will judicially notice. *Ib.*

It is not impertinent in a bill for an injunction to refer to recent adjudications of the question involved by co-ordinate tribunals, as the attention of the defendants and the court is thus properly brought to them. *Ib.* 564.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, exceptions for impertinence might be allowed where the matter was stated with needless prolixity. If the matters were material the exception would not be allowed, as that would leave the defendant without remedy, but the allegations would be allowed to remain in the answer and their effect, if found true, determined on final hearing. *Chapman v. School District*, 1 *Deady*, 108; *Fed. Cases*, 2,607.

Where the same matter is repeated in two or more places in a bill such repetitions will be struck out and an amendment allowed. *Nevada Nickel Syndicate v. National Nickel Co.*, 86 *Fed. R.* 486-488.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, pleadings in equity are viewed without regard to form, and exceptions were never allowed if made under circumstances likely to effect a surprise to either party. *Surget v. Byers*, *Hempst.* 715; *Fed. Cases*, 13,629.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, on exceptions because of irrelevant matter courts always give the answer a liberal consideration, having regard to the nature of the case made by the bill. *Griswold v. Hill*, 1 *Paine*, 390; *Fed. Cases*, 5,835.

The court is not expected to search the bill and answer through, to discover the grounds of exception. *Schultz v. Phoenix Ins. Co.*, 77 *Fed. R.* 375-390.

RULE XXII—*Action at Law Erroneously Begun as Suit in Equity—Transfer*

If at any time it appear that a suit commenced in equity should have been brought as an action on the law side of the court, it shall be forthwith transferred to the law side and be

there proceeded with, with only such alteration in the pleadings as shall be essential.

A new rule promulgated November 4, 1912.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, an objection that a court of equity was without jurisdiction because an adequate remedy existed at law came too late in an appellate court, unless the want of jurisdiction appeared on the face of the bill. *Wylie v. Coxe*, 15 *How.* 415-420, 14 L. ed. 753.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, an objection that a Federal court was without jurisdiction because the complainant had an adequate remedy at law must be made by demurrer or plea. By answering to the merits respondent waived any right to object to the power of the court to deal with the case as one in equity, the court having the power to grant the relief sought. *Brown v. Lake Superior Iron Co.*, 134 *U. S.* 530-536, 33 L. ed. 1021.

To prevent matters purely cognizable at law from being drawn into chancery at the pleasure of the parties, if on looking into the proofs it finds none of the matters which make a proper case for equity the court of its own motion may dismiss the bill. *Lewis v. Cocks*, 23 *Wall.* 466, 23 L. ed. 70.

The objection that on the plaintiff's own showing the court has no jurisdiction in equity may be noticed by the court. *Strong v. Richmond, etc., R. Co.*, 101 *Fed. R.* 511-515, 41 *C. C. A.* 474.

Where the Circuit (District) Court dismisses the bill for want of jurisdiction it has no power to decree the payment of costs and penalty. *Citizens' Bank v. Cannon*, 164 *U. S.* 319-324.

An exception to the rule that costs must go to the prevailing party, is found where the remedy in equity is refused, and yet the party may proceed at law; in such case, provided a stipulation is entered into by the party that he will not proceed at law, costs will not be allowed upon bill dismissed. *Webb v. Bowers*, 11 *Law. Rep.* 84; *Fed. Cases*, 17,319.

RULE XXIII—*Matters Ordinarily Determinable at Law, when Arising in Suit in Equity to be Disposed of Therein*

If in a suit in equity a matter ordinarily determinable at law arises, such matter shall be determined in that suit

according to the principles applicable, without sending the case or question to the law side of the court.

A new rule promulgated November 4, 1912.

Decisions

A party who claims a legal title must proceed at law, and a party whose title is equitable must follow the forms and rules of equity prescribed by the Supreme Court under authority of the Act of Aug. 23, 1842, sec. 917, *Rev. Stats. (U. S. Comp. Stats. 1901, p. 684)*. *Hart v. Hollingsworth*, 100 U. S. 100-103, 25 L. ed. 571, Oct. T., 1879.

Although a party may have waived matters of form by going to a hearing in an action brought on the law side of the court, if the action is strictly in equity he has a right to insist on the provisions of the Process Act of 1792, re-enacted as sec. 913, *Rev. Stats. (U. S. Comp. Stats. 1901, p. 683)*, by which the blending of equitable and legal causes of action in one suit is prohibited. *Ib.* 103.

The findings of a jury upon an issue of fact directed by an equity court are merely advisory, and the court may disregard them entirely or adopt them either partially or *in toto*. *Kohn v. McNulta*, 147 U. S. 238-240, 37 L. ed. 150.

A court of equity will not frame issues and order a trial by jury before any evidence has been taken in the trial, and where it cannot be known at that stage of the case whether any substantial dispute will be left in reference to such issues. *Fenno v. Primrose*, 125 *Fed. R.* 634-637.

RULE XXIV—*Signature of Counsel*

Every bill or other pleading shall be signed individually by one or more solicitors of record, and such signatures shall be considered as a certificate by each solicitor that he has read the pleading so signed by him; that upon the instructions laid before him regarding the case there is good ground for the same; that no scandalous matter is inserted in the pleading; and that it is not interposed for delay.

An amendment of Rule 24 of the Rules adopted March 2, 1842.

Decisions

Under Rule 24 the signature of counsel takes the place of an examination of the bill by the chancellor under the old practice. *United States v. American Lumber Co.*, 85 *Fed. R.* 827-830, 29 *C. C. A.* 431.

The printed name of counsel is not his signature. *Nightingale v. Oregon Cent. R. Co.*, 2 *Sawyer* 338; *Fed. Cases*, 10,264.

The bill must be signed by counsel. But a signing on the back is sufficient. *Dwight v. Humphries*, 3 *McLean*, 104; *Fed. Cases*, 4,216.

A bill filed without the signature of counsel was ordered taken off the files; it may be restored on motion after signed. *Roach v. Hulings*, 5 *Cranch C. C.* 637; *Fed. Cases*, 11,874.

A counsellor of the court may sign the bill as "solicitor." *Stenson v. Hildrop*, 8 *Biss.* 376; *Fed. Cases*, 13,459.

A distinction made between the attorney and his principal in a suit. *Read v. Consequa*, 4 *Wash. C. C.* 174; *Fed. Cases*, 11,606.

RULE XXV—*Bill of Complaint—Contents*

Hereafter it shall be sufficient that a bill in equity shall contain, in addition to the usual caption:

First, the full name, when known, of each plaintiff and defendant, and the citizenship and residence of each party. If any party be under any disability that fact shall be stated.

Second, a short and plain statement of the grounds upon which the court's jurisdiction depends.

Third, a short and simple statement of the ultimate facts upon which the plaintiff asks relief, omitting any mere statement of evidence.

Fourth, if there are persons other than those named as defendants who appear to be proper parties, the bill should state why they are not made parties—as that they are not within the jurisdiction of the court, or cannot be made parties without ousting the jurisdiction.

Fifth, a statement of and prayer for any special relief pending the suit or on final hearing, which may be stated and sought in alternative forms. If special relief pending the suit be desired the bill should be verified by the oath of the plaintiff, or some one having knowledge of the facts upon which such relief is asked.

This rule appears to be a substitute for Rules 20, 21, 22 and 23 of the Rules adopted March 2, 1842.

Decisions

The names of parties and their citizenship should be stated in the body of the bill. The title or caption is not a part of the bill, and it is not sufficient to state the names and citizenship therein only. *Jackson v. Ashton*, 8 *Pet.* 148-149, 8 *L. ed.* 898.

A statement of the residence of the parties to a bill in equity in the Federal court is not necessary to confer jurisdiction, except in cases in which the jurisdiction depends on the diverse citizenship of the parties. *Wright v. Skinner*, 136 *Fed. R.* 694-695.

To give jurisdiction the citizenship of a defendant is as necessary to be stated as that of complainant. *Findlay v. Bank of U. S.*, 2 *McLean*, 44; *Fed. Cases*, 4,791.

The citizenship should appear on the face of the bill or the bill will be dismissed for want of jurisdiction. *Dodge v. Perkins*, 4 *Mason*, 435; *Fed. Cases*, 3,954.

An averment that plaintiff, a bank incorporated under the Act of Congress, is a citizen of the State of ———, and located and residing and doing business in the city of ———, in said State, and that the defendant is a citizen of another State, is a sufficient averment to show jurisdiction. *Mfgs. Nat. Bank v. Baack*, 8 *Blatchf.* 137; *Fed. Cases*, 9,052.

Where the bill properly avers the necessary facts to confer jurisdiction on the Federal court, the burden is upon the defendant to both allege and prove the facts relied upon to defeat the jurisdiction. *Wiemer v. Louisville Water Co.*, 130 *Fed. R.* 244.

The bill must distinctly state the citizenship of every necessary party to it, and, where jurisdiction is dependent on it, show that the complainants and defendants are citizens of different States. *Speigel v. Meredith*, 4 *Biss.* 120; *Fed. Cases*, 13,227.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, no appearance, demurrer, or answer to a bill would waive such an omission in it. *Ib.*

It must appear affirmatively on the face of the bill that complainants are not citizens of the same State with the defendants. *Mescerole v. Union Paper C. Co.*, 6 *Blatchf.* 356; *Fed. Cases*, 9,488.

Where the residences of parties are not given, such failure may be corrected by an amendment on motion. *Harvey v. Richmond, etc., Co.*, 64 *Fed. R.* 19-21.

The bill must specifically state the district of the residence of the parties, where there is more than one judicial district in the State. *Ib.*

The statement of citizenship is necessary in original bills where jurisdiction depends on that. In removed causes, both at law and in equity, it should appear, when required in the petition for removal. *Danccl v. United Shoe M. Co.*, 120 *Fed. R.* 839-840.

A defective statement may be amended under sec. 954, *Rev. Stats.* (*U. S. Comp. St.*, 1901, p. 696), which applies to equity causes. *Ib.* 840.

The court may, on its own motion, dismiss a bill defective for want of proper allegations as to the citizenship of the parties in that portion of the bill, where they are properly inserted, unless the bill is amended within a time named. *City, etc., v. Tibetts*, 51 *Fed. R.* 852-855.

Persons cannot be made parties to a bill by fictitious names; and appearance after service of subpoena upon persons so designated is void and will be set aside. *Kentucky, etc., Co. v. Day*, 2 *Sawy.* 468; *Fed. Cases*, 7,719.

Appearance of a corporation sued under a wrong name is good as an admittance that such is its true name. *Virginia, etc., Co. v. United States*, *Taney*, 418; *Fed. Cases*, 16,973.

A person who has no interest in a legal sense in the subject-matter of a suit *in personam* cannot compel the plaintiff to make him a party. *Coleman v. Martin*, 6 *Blatchf.* 119; *Fed. Cases*, 2,985.

Every bill must contain in itself sufficient matter of fact to maintain plaintiff's case. *Harrison v. Nixon*, 9 *Pet.* 483, 9 L. ed. 201.

It is not always necessary that the bill minutely charge all the facts which are matters of evidence; but there must be in the bill allegations broad enough to cover any evidence offered. *Nesmith v. Calvert*, 1 *Woodb. & M.* 34; *Fed. Cases*, 10,123.

General allegations in the bill are often sufficient to render proper the introduction of evidence of documents or cumulative facts in support thereof. *Ib.*

A bill may be framed with a double aspect so that if the court decide against the complainant in one view of the case, it may afford him relief in another. *Hobson v. McArthur*, 16 *Pet.* 182-195, 10 L. ed. 930.

But the alternative case stated must be the foundation of precisely the same relief. *Shields v. Barrow*, 17 *How.* 130-144, 15 L. ed. 158.

In a suit to recover property procured by fraud the prayer of the bill may be in the alternative to recover the specific property or its value. *Hubbard v. Urton*, 67 *Fed. R.* 419-425.

Such alternative relief may be sought by amendment to the bill. *Hardin v. Boyd*, 113 *U. S.* 756, 28 L. ed. 1141.

The material facts on which plaintiff relies must be so distinctly alleged as to make an issue. *Harding v. Handy*, 11 *Wheat.* 103-121, 6 L. ed. 429.

A party is not allowed to state one case in a bill or answer and make out a different one by proof; the *allegata* and *probata* must agree; the latter must support the former. *Boone v. Chiles*, 10 *Pet.* 177-209, 9 L. ed. 388.

When facts are not charged in the bill they are not put in issue by the answer and the court can take no notice of the proofs, for the proofs to be admissible must be founded on some allegations in the bill and answer. *Piatt v. Vattier*, 9 *Pet.* 405, 9 L. ed. 173.

The proofs must be according to the allegations of the parties. If the proofs go to matters not within the allegations the court cannot judicially act upon them as ground for its decision; for the pleadings do not put them in contestation. The *allegata* and the *probata* must reciprocally meet and conform to each other. Story, J., in *Harrison v. Nixon*, 9 *Pet.* 503, 9 L. ed. 201.

Where complainant alleged generally that he would be injured and prayed an injunction, *Held*, it was necessary he should state how he would be injured, since chancery does not deal with abstractions or contingencies, but with practical rights and to prevent impending wrongs. *Spooner v. McConnell*, 1 *McLean*, 337, *Fed. Cases*, 13,245.

A bill charging fraud should aver the facts relied on with sufficient particularity to warrant its conclusion and to apprise the defendant of what he must meet. *Field v. Hartings & Bradley Co.*, 65 *Fed. R.* 279-280.

A bill for a rescission or injunction must contain clear and positive allegations showing the equitable right of complainant to the relief asked. *Post v. Beacon, etc., Co.*, 84 *Fed. R.* 371-373, 28 *C. C. A.* 431.

Under the practice prior to the revision of the rules at the October Term, 1912, if a bill was used as evidence either on a motion for a preliminary injunction or in any other way, it must have been verified. *Black v. Henry G. Allen Co.*, 42 *Fed. R.* 618.

In patent cases it is not necessary to specify particulars of infringement in a bill in equity; a general averment that the defendant has infringed is sufficient to put him upon answer. *Turrell v. Cammerrer*, 3 *Fisher's Patent Cases*, 462; *Fed. Cases*, 14,266.

The following is the proper form of verification of a bill praying an injunction:

I, A. B., the complainant (or one of the complainants) in the foregoing bill being first duly sworn, on oath do say that I have read (or heard read) the above bill of complaint and know the contents thereof,

and that the allegations therein contained are true of my own knowledge, except as to matters which are therein stated to be on information and belief, and as to those matters I believe and have good reason to believe them to be true.

A. B.

Sworn to and subscribed before me
at _____, the _____ day of
_____, A. D. 19—.

Notary Public.

My commission expires _____.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, under a prayer for general relief only such relief as the facts stated in the bill and sustained by the proof would justify, could be granted. *Hobson v. McArthur*, 16 *Pet.* 182-195, 10 L. ed. 930.

Where specific relief is prayed the court cannot grant a relief which is inconsistent with or entirely different from that prayed, even if there is a prayer for general relief. *Wilson v. Graham*, 4 *Wash. C. C.* 53; *Fed. Cases*, 17,804.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, under the prayer for general relief other relief might be granted than that which was particularly prayed for, but such relief must be agreeable to the case made by the bill. *English v. Foxall*, 2 *Pet.* 595, 7 L. ed. 531.

A prayer for general relief is a prayer for any relief the court can give upon the facts averred in the bill (except by injunction). *Chicago, etc., R. Co. v. Macomb*, 2 *Fed. R.* 18-21.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, under the prayer for general relief the court would often extend the relief beyond the specific prayer, and not exactly in accordance with it. *Walden v. Bodley*, 14 *Pet.* 156-164, 10 L. ed. 398.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, though not entitled to the relief specifically prayed for, other relief consistent with the facts averred and proved might be granted under the general prayer. *Moore v. Mitchell*, 2 *Woods*, 483; *Fed. Cases*, 9,770.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, a prayer for general relief covered and included a prayer for specific performance. *Tayloe v. Merchants' F. Ins. Co.*, 9 *How.* 390-406, 13 L. ed. 187.

Under the rules in force prior to the revision promulgated November 4, 1912, in a proceeding in admiralty, *Held*, that under a prayer for general relief damages might be awarded. *Penhallow v. Doane*, 3 *Dall.* 54-86, 1 L. ed. 507.

In a suit for general administration of a trust by foreclosure, where classification of liens and preferences takes place, the usual strictness of pleading is not required of intervenors asserting claims or payment. *Blake v. Pine Mountain, etc., Co.*, 76 *Fed. R.* 624-638, 22 *C. C. A.* 430.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, a petition "by way of cross-bill" which makes nobody defendant, nor prays for process, and on which no process was obtained is a nullity. *Washington Railroad v. Bradleys*, 10 *Wall.* 299-303, 19 L. ed. 894.

In a suit concerning the wife's property, where the wife in the pleadings is treated as the party in interest, the bill being sworn to by her, the husband's name may be used as her next friend. *Bien v. Heath*, 6 *How.* 228-239, 12 L. ed. 416.

Where the wife complains of the husband and asks relief against him she must use the name of some other person in prosecuting the suit, but where the acts of the husband are not complained of, he would seem to be the most suitable person to unite with her in the suit. *Ib.* 240.

Whether the husband is joined with the wife, or she sues by him as her next friend, is a matter of practice, within the discretion of the court. *Ib.* 240.

A married woman must sue and be sued jointly with her husband, unless she claims a right in opposition to him, in which case her next friend with her consent may exhibit a bill in her behalf, and her husband be made a party defendant. *Taylor v. Holmes*, 14 *Fed. R.* 498-513.

The husband may be permitted to join with the wife, although there is no prayer for his relief. *Douglas v. Butler*, 6 *Fed. R.* 228.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, under old Rule 90 that where it was consistent with the local circumstances and State laws governing the rights of married women, it was proper to allow a married woman to maintain a suit in her own name for infringement of a patent, without joinder of her husband. *Lorrillard v. Standard Oil Co.*, 2 *Fed. R.* 902-904.

The writ of *ne exeat* may be granted without a special prayer for it in the bill; it may be granted in the decree under the general prayer, or upon petition either before or after decree, on facts shown. *Lewis v. Shainwald*, 48 *Fed. R.* 492-500.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, the limitation of former Rule 21 only applied where the writ was asked for "pending the suit." *Ib.* 500.

Held, the District Court (as distinguished from the judge) had authority to issue the writ. *Ib.* 501.

Under sec. 2 of the Bankruptcy Act of 1898, a District Court has power to issue the writ. *In re Lipke*, 98 *Fed. R.* 970.

Under sec. 717, *Rev. Stats.* (sec. 261, Judicial Code), *U. S. Comp. Stats.* 1901, p. 580, the writ is not to be issued "unless a suit in equity is commenced." *Ib.* 972.

Where the averments of the bill that the defendant intends to depart out of the jurisdiction of the court are upon information and belief and have been denied by the answer the writ should not be granted. *Shainwald v. Lewis*, 46 *Fed. R.* 839.

RULE XXVI—*Joinder of Causes of Action*

The plaintiff may join in one bill as many causes of action, cognizable in equity, as he may have against the defendant. But when there is more than one plaintiff, the causes of action joined must be joint, and if there be more than one defendant the liability must be one asserted against all of the material defendants, or sufficient grounds must appear for uniting the causes of action in order to promote the convenient administration of justice. If it appear that any such causes of action cannot be conveniently disposed of together, the court may order separate trials.

A new rule promulgated November 4, 1912.

Decisions

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, it was impossible to lay down any general rule as to multifariousness. Every case must be governed by its own circumstances. The court must exercise a sound discretion on the subject. *Gaines v. Chew*, 2 *How.* 619-642, 11 L. ed. 619.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, the rule against multifariousness was founded on convenience and must be applied to the circumstances of each case. *McLean v. Lafayette Bank*, 3 *McLean*, 415; *Fed. Cases*, 8,886.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, whether a bill was multifarious was largely a matter of

discretion, and a decision overruling an objection to a bill on that ground would not be reviewed on appeal. *Ulman v. Jaeger*, 67 *Fed. R.* 980-985.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, multifariousness arose from the fact that the transactions which form the subject-matter of the suit are so dissimilar and separate that they cannot conveniently be tried together on one record, or because some defendant is able to say, as to a large part of the transactions set out in the bill, he has no interest or connection whatever. *Barcus v. Gates*, 89 *Fed. R.* 783-791, 32 *C. C. A.* 337.

The reasons why bills are deemed multifarious and the inconvenience they occasion. *Hayes v. Dayton*, 8 *Fed. R.* 703.

The case against one defendant may be so entire as to be incapable of being prosecuted in several suits, yet some other defendant may be a necessary party to some portion only of the case stated. It is not indispensable that all the parties should have an interest in all the matters contained in the suit; it will be sufficient if each party has an interest in some material matter in the suit and they are connected with the others. *Brown v. Guarantee T. and Safe Deposit Co.*, 128 *U. S.* 403-410, 32 *L. ed.* 470, Oct. T., 1888.

There can be no misjoinder of causes of action in equity in any bill which presents a common point of litigation which affects the entire subject-matter and the decision of which will settle the rights of all the parties to the suit. *Ib.* 412.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, objections that a bill was multifarious must be made before answer and could be tested only by the structure of the bill itself. *Nelson v. Hill*, 5 *How.* 127, 12 *L. ed.* 81.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, objections for multifariousness could not be taken by exceptions. They could be taken only by demurrer, plea, or answer before hearing, but the court might itself take the objection at any time, at the hearing or otherwise. *Oliver v. Piatt*, 3 *How.* 333-412, 11 *L. ed.* 622.

Where objection of multifariousness is first made at the hearing, if the court can without serious embarrassment make a decree, it will do so and not countenance the objection. *Ib.* 412.

RULE XXVII—*Stockholder's Bill*

Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the

corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action, or the reasons for not making such effort.

Substantially the same as Rule 94 of the rules in force prior to Feb. 1, 1913.

Promulgated Jan. 23, 1882, 104 U. S. IX.

Decisions

The corporation should be made a party to the suit, and a demurrer will lie if it is not so made, as any decree made should include the corporation. *Davenport v. Downs*, 18 *Wall.* 626-627, 21 L. ed. 96.

To enable a stockholder of a corporation to sustain suit in equity in his own name in which the corporation itself is the appropriate plaintiff, on an action founded on rights existing in the corporation, it must appear that there exists: (1) Some action or threatened action of the trustees of the corporation, beyond the authority conferred on them by the charter or source of organization; or (2) such a fraudulent transaction, completed or threatened by its managers, either among themselves or with some other party, or other shareholders, as will result in a serious injury to the corporation, or to other shareholders; or (3) that the directors, or a majority of them, are acting for their own interests in a manner destructive to the company, or of the rights of the other shareholders; or (4) that the majority of the shareholders are illegally and oppressively, in the name of the corporation, pursuing a course in violation of the rights of the other shareholders which can only be restrained by a court of equity, or possibly, (5) other cases where the court may properly act to prevent irremediable injury or a total failure of justice. *Hawes v. Oakland*, 104 U. S. 450-460, 26 L. ed. 827.

Before a shareholder is permitted in his own name to institute litigation in which the corporation itself is the appropriate plaintiff, he should satisfy the court that he has exhausted all the means within his reach, to obtain by the corporation itself adequate redress. *Ib.* 460-461.

If he fails with the directors, he must seek to obtain action by the stockholders as a body. *Ib.* 461.

Before a stockholder can maintain an action to restrain or annul an illegal act by the directors of a corporation, he must exhaust all his

means to obtain within the corporation itself, action in conformity with his reasonable requirements. *Bill v. Western Union Tel. Co.*, 16 *Fed. R.* 14-18.

Unless under judicial restraint or compulsion, to the board of directors belongs the sole power to determine whether or not to bring suit for a supposed injury to a corporate right. *United States v. U. P. R. R. Co.*, 98 *U. S.* 569-611, 25 *L. ed.* 153, Oct. T., 1878.

Courts of equity have jurisdiction over corporations at the instance of one or more stockholders to apply preventive remedies to prevent those who administer them from doing acts which amount to a violation of charters and to prevent misapplication of their capital or profits, if the acts amount to a breach of trust. *Dodge v. Woolsey*, 18 *How.* 331-341, 15 *L. ed.* 401.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, that where five of the seven directors who participated in the original conspiracy were still members of the directory, and it was claimed that it would be useless to apply to them to undo the wrong inflicted on the corporation, it was not an excuse for failure to make the efforts required by Rule 94. *Church v. Citizens' St. R. Co.*, 78 *Fed. R.* 526-531.

It is still required that an effort should be made to induce action by the body of the corporation, that is, by the stockholders. *Ib.* 531.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, old Rule 94 applied to a bill brought by one or more stockholders founded on rights which may properly be asserted by the corporation. A suit instituted by stockholders and creditors against the corporation itself, alleging that its controlling officers are wrecking the corporation for their own private ends, being a suit to rescue the corporation, is not within the inhibition of old Rule 94, and it is not necessary to show that plaintiff has endeavored to secure action on the part of the directors. *Excelsior Pebble Phosphate Co. v. Brown*, 74 *Fed. R.* 321-323, 20 *C. C. A.* 428.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, old Rule 94 applied only to bills brought by a stockholder against the corporation and others founded on rights which may properly be asserted by the corporation; but did not apply to a suit brought by stockholders against the corporation and another not founded on such rights, where the officers of the corporation are joined for discovery merely, and no relief is sought against them or to restrain any official action on their part. *Leo v. Union Pacific Ry. Co.*, 17 *Fed. R.* 273-274.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, no more technical compliance with Rule 94 was sufficient. The courts will inquire as to the stockholder's right to sue the corporation, and will determine from the bill in its entirety whether the plaintiff has made such a showing of wrong on the part of the corporation or its officers, and injury to himself as will justify the suit. *Corbus v. Alaska Treadwell Co.*, 187 U. S. 455-463, 47 L. ed. 259, Oct. T., 1902.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, where averments were made in the bill which brought the complainant within the requirements prescribed by old Rule 94, but which were plainly evasive and insufficient, and their utmost effect was to show a formal demand and a formal refusal, although the bill may aver that the suit is not a collusive one to confer jurisdiction, the bill may not be maintained unless there was the requisite diversity of citizenship. Old Rule 94 imposed upon the stockholder earnest and persistent effort to induce action by the officers of the corporation or the stockholders as a body. *Elkins v. The City of Chicago*, 119 Fed. R. 957-959.

Where the interests of the complainant as stockholder of the charter corporation are identical with those of the corporation itself, such status is a bar to jurisdiction in the Federal court, based alone on diversity of citizenship, unless compliance with the Equity Rule appears in the allegations of the bill and saves the case from the general doctrine of alignment of parties. Though diverse citizenship of the parties may be properly arranged on the face of the bill to confer jurisdiction, it is the duty of the court to align them in conformity with their true interests. *Ib.* 958.

Where it is apparent that the refusal of the officers of the corporation which was made the basis of the suit is for the sole purpose of enabling the suit to be brought in the Federal court, a case of such absolute and unjustifiable refusal as is required by the Rule is not made out. *Detroit v. Dean*, 106 U. S. 537-541, 27 L. ed. 300.

The Rule, except as to the provision concerning the verification of the bill by oath is in effect merely to prescribe what was the correct practice theretofore; it does not in anywise alter or modify any of the jurisdictional principles upon which a bill by a stockholder to enforce rights of the corporation should be founded, nor in any manner alter or modify the rules concerning the alignment of parties required to confer jurisdiction upon the Federal courts. *Groel v. United Electric Co.*, 132 Fed. R. 252-257.

In a bill by a citizen of California, a stockholder of a gas company, against the city of Chicago and the gas company, citizens of Illinois, to

restrain the city from enforcing an ordinance fixing rates to be paid by consumers of gas; upon objection that upon a proper alignment of parties according to interest the gas company should be grouped with the complainant, *Held*, that the court had jurisdiction, although the company and the city were citizens of the same State. *Mills v. City of Chicago*, 127 *Fed. R.* 731-735.

Where the stockholder's bill avers a demand upon the company, that it bring suit in the State court and that such demand was refused; upon demurrer these averments are admitted, and the court cannot determine that the suit is collusive. *Ib.* 735.

The objection that suit by a stockholder brought under Rule 94 is collusive should be sustained by some fact pointed out in the record or by proper pleadings. *Ib.* 735.

The fact that other stockholders, majority or minority, are citizens of the same State as the corporation or their attitude to the controversy by contribution or otherwise, is not material to the relief which the stockholder in a *bona fide* bill to restrain a breach of trust by the directors, or other violation of corporate duty, is entitled, if the management of a corporation is adverse to the object of the bill, and is not in collusion with the complainant. *New Albany Water Works v. Louisville Banking Co.*, 122 *Fed. R.* 776-779, 58 *C. C. A.* 576.

Where in a suit by a stockholder's bill the allegations of the answer simply amount to an averment that the stockholders, citizens of the same State as the corporation, induced the complainant to file the bill and are contributors to the expense, the suit is not shown to be collusive, where it appears that the controlling majority in the corporation is opposed to the objects sought in the bill, and that a demand upon the directors for action to obtain the relief sought would be useless. *Ib.* 779.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, under Rule 94 when a stockholder's suit was between citizens of different States it was cognizable by the Federal courts and the fact that the corporation has the same ultimate interest as the complainant stockholder does not oust the jurisdiction of the Federal court nor require that the corporation be aligned on the same side as the complainant, if the stockholder's interests and the interests of the corporation are being made subservient to illegal purposes by its managing officers. *Doctor v. Harrington*, 196 *U. S.* 579-587, 49 *L. ed.* 610, Oct. T., 1904.

The Rule is only a means to an end, intended to bring to the knowledge of the court, on the institution of a suit, all the facts upon which it might be informed, of whether such suit did really and substantially involve the controversy within the jurisdiction of the court. *Young v. Alhambra Mining Co.*, 71 *Fed. R.* 810-811.

A stockholder need not allege he has demanded that the directors bring suit, where such demand would require a suit among themselves, and the time in which remediable action may be taken had nearly expired. *Ib.* 812.

The bill must disclose the efforts of the plaintiff, not of others to secure redress in the ordinary mode, and he must state that he was a stockholder at the time of the transaction of which he complains, or that his shares have since devolved upon him by operation of law. *Dannmeyer v. Holman*, 11 *Fed. R.* 97-100.

In a stockholder's suit it is sufficient to sustain the jurisdiction if it clearly appears by the allegations of the bill that the complainants are stockholders, that the suit is not a collusive one to secure jurisdiction, and that the corporation will not move in its own behalf. *Price v. Union Lane Co.*, 187 *Fed. R.* 886, 110 *C. C. A.* 20-24.

Where a corporation desires by means of an injunction out of the Federal court to restrain defendants from inducing its employees to strike, but is unable to institute suit in the Federal court for want of diversity of citizenship, it will not be allowed to create a condition of affairs that will make the Rule applicable, by collusively refusing by its officers and managers, a request of certain of its stockholders to institute suit in the Federal court, such stockholders knowing that the Federal court was without jurisdiction to entertain suit between such corporation and the defendants, with the express purpose of enabling such stockholders to sue the corporation and the defendants sought to be restrained in the same suit in the Federal court. *Kemmerer v. Haggerty*, 139 *Fed. R.* 693-696.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, the fact that plaintiff had not complied with Rule 94 so as to show his right to maintain the suit did not go to the jurisdiction so as to require a dismissal on affidavits. *Illinois C. R. Co. v. Adams*, 180 *U. S.* 28-35, 45 *L. ed.* 412, Oct. T. 1900.

Held further: with few exceptions the only facts required to vest jurisdiction in the Circuit Courts under the Act of Aug. 13, 1888 (Mar. 3, 1887), were that the plaintiff be a citizen of one State and the defendant of another, the amount in controversy be in excess of \$2,000, and the defendant be properly served with process in the district where suit is brought. *Ib.* 34.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, Rule 94 did not apply to a case removed from a State court. If it is shown anywhere in such suit in the entire record that a corporation will not proceed to vindicate its right, a shareholder may be

allowed to prosecute the suit after it has been removed. *Evans v. Union Pacific Ry. Co.*, 58 *Fed. R.* 497-500.

A bill brought in the State court and removed into a Federal court is not insufficient because of failure to set forth therein the effort of complainant to secure previous action by the officers of a corporation. Old Rule 94 had reference solely to suits commenced in the Federal courts. *Earle v. Seattle L. S. & E. Ry. Co.*, 56 *Fed. R.* 909-915.

RULE XXVIII—*Amendment of Bill as of Course*

The plaintiff may, as of course, amend his bill before the defendant has responded thereto, but if such amendment be filed after any copy has issued from the clerk's office, the plaintiff at his own cost shall furnish to the solicitor of record of each opposing party a copy of the bill as amended, unless otherwise ordered by the court or judge.

After pleading filed by any defendant, plaintiff may amend only by consent of the defendant or leave of the court or judge.

The rule appears to be a substitute for Rules 28, 29 and 30 of the Rules adopted March 2, 1842.

Decisions

An amendment is not required in order to set out in the bill that which may be used simply as evidence to establish a fact or facts put in issue by the pleadings. *Southern Pac. Ry. v. United States*, 168 *U. S.* 1-57, 42 *L. ed.* 355.

Under the rules prior to the revision at Oct. Term, 1912, *Held*, that Rule 28 had no application to a motion to amend after a demurrer to the whole bill had been sustained. It applied only where leave was asked before a demurrer was allowed. *Mercantile N. Bk. v. Carpenter*, 101 *U. S.* 567-568, 25 *L. ed.* 816.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, under former Rule 28, before plaintiff could claim any benefit of an amendment, he must pay the costs occasioned, and furnish the copies required by the rule. If he failed so to do, by the withdrawal of an amendment he left the case to stand as though no amendment had been attempted. *Sheffield v. Withrow*, 149 *U. S.* 574-576, 37 *L. ed.* 853.

Amendments which amount in effect to the institution of a new suit, will not be allowed. *Goodyear v. Bourn*, 3 *Blatchf.* 268; *Fed. Cases*, 5,561.

A complainant is not at liberty to abandon the entire case made by his bill and make a new and different case by way of amendment. *Shields v. Barrow*, 17 *How.* 130-144, 15 L. ed. 158.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, if the statute of limitations was set up in bar, plaintiff must amend his bill if it contained no suitable allegations to meet the bar. *Piatt v. Vattier*, 9 *Pet.* 405-416, 9 L. ed. 173.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held* if the answer set up a defense which the complainant wished to avoid he must amend his bill, as under former Rule 45 special replication was not permitted. *Wilson v. Stolley*, 4 *McLean*, 272; *Fed. Cases*, 17,839.

Where a defense is made to a bill which the complainant could not foresee, an amendment may be allowed thereafter. *Wharton v. Lowrey*, 2 *Dallas*, 364, 1 L. ed. 417.

Complainant is bound by an admission of fact contained in his bill, and cannot in argument urge that the fact is otherwise. He should amend his bill before the hearing. *Prevost v. Gratz*, 3 *Wash. C. C.* 434; *Fed. Cases*, 11,407.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held* an amendment would not be allowed to the bill after answer and replication were filed, and depositions taken, unless upon a showing that the amendment could not earlier have been made. *Ross v. Carpenter*, 6 *McLean*, 382; *Fed. Cases*, 12,072.

An amendment should not be allowed, seeking to introduce a new party to the bill, whose interest was known when the bill was filed. *Ib.*

Under former Rule 28 the plaintiff was entitled to amend his bill as a matter of course before answer, plea, or demurrer filed, and although amended in a material matter, it was not necessary that the amendment proposed should be supported by affidavit. A bill in equity is not required to be sworn to unless it is sought to be used in evidence upon application for a provisional injunction or the like. *Chase Electric Const. Co. v. Columbia Const. Co.*, 136 *Fed. R.* 699.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, it was a gross irregularity to hear a cause upon an amended bill filed after replication without leave of the court. *Wash. Ry. v. Bradleys*, 10 *Wall.* 299, 19 L. ed. 894.

The defendant, if without laches, might move to strike such bill from the files. *Ib.*

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, where at a hearing it appeared that a motion to amend the bill was made, and that the facts and the answer made out a case for relief, but a case different from the one stated in the bill, but that the amendment did not change the subject-matter of the bill, the motion should be granted, where the purposes of justice would be thus subserved. *Battle v. Mutual Life Ins. Co.*, 10 *Blatchf.* 417; *Fed. Cases*, 1,109.

Where an amended bill refers to an original bill, and makes the same a part thereof, all the parties named in the original bill are parties to the amended bill, although not particularly named therein, where the bill prays that the parties defendant to the original bill be made defendants to the amended bill. *Empire Coal Co. v. Empire Mining Co.*, 150 *U. S.* 159-163, 37 *L. ed.* 1039.

New process is not necessary on an amended bill, as the defendant is already before the court. Being in court he is bound to take notice of the filing of such bills, as of any other proceedings in the case. *French v. Hay*, 22 *Wall.* 238-247, 22 *L. ed.* 801; *Longworth v. Taylor*, 1 *McLean*, 514; *Fed. Cases*, 8,491.

Where the trial court sustained exceptions to the answer, whereupon a final decree was entered in favor of plaintiff, which on appeal was reversed, *Held*, complainant was entitled to amend his bill, or file a replication to the answer as the parties then stood after error corrected as if they had then arrived at the point where the error occurred. *Re Sanford Fork & Tool Co.*, 160 *U. S.* 250-258, 40 *L. ed.* 416, 417.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, amendments regularly made under former Rule 29 would not be avoided by motion to strike the order allowing them from the record, or set it aside. *Lichtenauer v. Cheney*, 8 *Fed. R.* 876.

RULE XXIX—*Defenses—How Presented*

Demurrers and pleas are abolished. Every defense in point of law arising upon the face of the bill, whether for misjoinder, nonjoinder, or insufficiency of fact to constitute a valid cause of action in equity, which might heretofore have been made by demurrer or plea, shall be made by motion to dismiss or in the answer; and every such point of law going to the whole or a material part of the cause or causes of action stated in the bill may be called up and disposed of before final hearing at the discretion of the court. Every defense hereto-

fore presentable by plea in bar or abatement shall be made in the answer and may be separately heard and disposed of before the trial of the principal case in the discretion of the court. If the defendant move to dismiss the bill or any part thereof, the motion may be set down for hearing by either party upon five days' notice, and, if it be denied, answer shall be filed within five days thereafter or a decree *pro confesso* entered.

The Rule appears to be a substitute for Rules 31 to 38, inclusive, of the Rules adopted March 2, 1842.

Decisions

The court may of its own motion dismiss a bill because it fails to state facts sufficient to give any right to relief. *Fougeres v. Jones*, 66 *Fed. R.* 316-317.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, a bill might be dismissed by the court of its own motion where it omitted the proper allegation of citizenship in the introductory part, and where the prayer for subpoena did not contain the names of the defendants. *City of Carlsbad v. Tibbetts*, 51 *Fed. R.* 852.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, in general, if a demurrer would hold to a bill the court would not grant relief, though the defendant answered. *Baker v. Biddle*, 1 *Baldw.* 394; *Fed. Cases*, 764.

An objection to jurisdiction for want of necessary parties, of equity in the bill or that there was a remedy at law need not be made by demurrer, plea or answer; it might be made at the hearing or on appeal. *Ib.*

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, no defect of jurisdiction appearing on the record, the proper mode to avail of it, if it existed, was by plea. *Fremont v. Merced Mining Co.*, 1 *McAll.* 267; *Fed. Cases*, 5,095.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, objections to jurisdiction on the ground of citizenship must be presented by proper plea in abatement before the cause came to hearing on the merits. *Nesmith v. Calvert*, 1 *Woodb. & M.* 34; *Fed. Cases*, 10,123.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, the exception to jurisdiction on the ground of citizenship must be taken by plea and not by answer. *Wood v. Mann*, 1 *Sumn.* 578; *Fed. Cases*, 17,952.

The want of proper parties is not a sufficient ground for dismissing the bill. *Milligan v. Milledge*, 3 *Cranch*, 220.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, where the want of parties appeared on the face of the bill the objection might be taken by demurrer; where it did not so appear it must be made by plea or answer. *Carey v. Brown*, 92 *U. S.* 171-172, 23 *L. ed.* 469.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, where it appeared on the face of the bill that the complainant was not entitled to relief because of laches or lapse of time, the objection might be taken by demurrer. *Maxwell v. Kennedy*, 8 *How.* 210-222; *Natl. Bk. v. Carpenter*, 101 *U. S.* 567-568, 25 *L. ed.* 815.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, a bill which showed on its face that complainant's right was barred by the statute of limitations might be demurred to. *Wisner v. Ogden*, 4 *Wash. C. C.* 631; *Fed. Cases*, 17,914.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, the usual averment in a foreclosure bill that the defendant claimed some interest in the mortgaged premises is to compel such defendant to answer. If it was not averred that such defendant owed any part of the debt or had any specific interest in the property he could not by demurrer object that complainant's suit was barred by laches or lapse of time. *Carter v. Couch*, 84 *Fed. R.* 735-738, 28 *C. C. A.* 520.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, if on the face of the bill it appeared that a contract concerning land was not in writing, the defense of the statute of frauds might be taken by demurrer. *Randall v. Howard*, 2 *Black*, 585-589, 17 *L. ed.* 269.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, where the bill alleged that the complainant was ignorant of the matters, the foundation of his suit, and that immediately on discovery thereof suit was brought, a demurrer on the ground of laches should be overruled. *Ulman v. Jager*, 67 *Fed. R.* 980-982.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, as against a general demurrer, an allegation in a bill by way of recital was good, where the allegation admitted of but one interpretation and the essential fact appeared by necessary implication. *Investor Pub. Co. v. Dobinson*, 72 *Fed. R.* 603-605,

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, where a bill charged acts of fraud and set up an agreement by defendant to execute a mortgage on real estate and averred a refusal, defendant could not by plea set up the statute of frauds, but was required to respond to the facts averred in the bill in support of complainant's equity. *Bailey v. Wright*, 2 *Bond*, 181; *Fed. Cases*, 749.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, an action pending in a foreign jurisdiction could not be pleaded in abatement of an action commenced in a domestic forum, even if there were identity of parties, of subject-matter and relief sought. *Radford v. Folsom*, 14 *Fed. R.* 97-98.

Under the rules in force prior to the revision promulgated November 4, 1912, defendants "appearing specially and solely for the purpose of this demurrer" as grounds therefor alleged that the court "has no jurisdiction over these defendants, because First: neither of these defendants is a citizen of Wisconsin, nor a resident of the eastern district thereof," and, second, "complainants have no interest on the subject matter of this suit."

When demurrer overruled and appeal taken, *Held*, when appellants added to their challenge of the court's jurisdiction over their persons a further challenge of the court's jurisdiction over the subject-matter they did not thereby convert their special appearance into a general appearance and submit to the jurisdiction of the court. *Kelley v. T. L. Smith Co.*, 196 *Fed.* 466, 116 *C. C. A.* 240.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, by appearing generally the objection that one was not named as a defendant in the prayer for subpoena was waived. *Buerk v. Imhaeuser*, 8 *Fed. R.* 457.

A defendant not named in the prayer for process could not object that others are omitted therefrom. *Ib.*

A decree dismissing a bill in a former suit, absolute in its terms, is an adjudication of the merits of the controversy, and constitutes a bar to any further litigation of the same subject between the same parties. *Durant v. Essex Co.*, 7 *Wall.* 107-109, 19 *L. ed.* 154.

A decree of dismissal because of some defect in the pleading or for want of jurisdiction, or because the complainant has an adequate remedy at law, or upon some other ground which does not go to the merits, is not a final determination. *Ib.*

To avoid the bar upon dismissal, words of qualification, such as "without prejudice," should be used. *Ib.*

It is the general practice where a bill in equity is dismissed without consideration of the merits, for the court to express in its decree that the dismissal is "without prejudice." If these words of qualification

are omitted by mistake they may in a proper case be corrected by the appellate court. *Ib.*

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, a decree under former Rule 38 dismissing complainant's bill because of failure to reply to a plea, or set it down for argument, was not conclusive, since all the authorities agree that in order to constitute the former judgment a bar, it must appear that the point in issue was judicially determined after a hearing and upon consideration of the merits. *Keller v. Stolzenbach*, 20 *Fed. R.* 47.

An order of dismissal is a bar only where the court has determined that the plaintiff had no title to the relief sought by his bill. Whenever a bill is dismissed without a hearing and without any consideration of the merits the dismissal is in the nature of a nonsuit at law, and is no bar, because the matters in controversy are not thereby judicially determined. *Clark v. Bernhard Mattress Co.*, 82 *Fed. R.* 339-340.

If the first suit was dismissed for defect of pleadings, or a misconception of the form of proceeding, or for the want of jurisdiction, the judgment rendered will be no bar to another suit. *Hughes v. United States*, 4 *Wall.* 232-237, 18 L. ed. 305, Dec. T., 1866.

A decree dismissing a bill in equity generally may be set up in bar of a second bill, having the same object in view; but where the bill is dismissed on the ground of want of jurisdiction, or where the complainant dismisses his bill, the dismissal is not a bar to another suit. *Walden v. Bodley*, 14 *Pet.* 156-161, 10 L. ed. 400, Jan. T., 1840.

Where a suit is dismissed for a defect in pleading, by reason of which the court's jurisdiction fails to appear, the dismissal is not a bar to a second suit. *Smith v. McNeal*, 109 *U. S.* 426-430, 27 L. ed. 987, Oct. T., 1863.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, where after replication a bill was dismissed on motion of the complainant it was no bar to a subsequent bill for the same cause. *Grubb v. Clayton*, 2 *Hayw.* 378; *Fed. Cases*, 5,849a.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, where defendant filed a demurrer and a plea to the bill and the plea was not replied to, nor it and the demurrer set for argument, the court said, if the bill were dismissed for this failure, under former Rules 33 and 38 such dismissal would not operate as *res judicata*; that a judgment on demurrer would not, and *a fortiori* a judgment for not following a rule of court, would not have this effect. *Ryan v. Seaboard & R. R. Co.*, 89 *Fed. R.* 397-403.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, where it appeared by the plea in bar that a former suit had been dismissed on motion of defendants made after filing a demurrer to the bill, and after the expiration of the time in which under the rules, the complainant could set down the demurrer for argument, *Held*, the plea set up a dismissal for want of prosecution and was no bar to a new suit. *Whitaker v. Davis*, 91 *Fed. R.* 720-721, 34 *C. C. A.* 61.

Held, further, that in order to set up by plea that the legal effect of a dismissal under former Rule 38 was the sustaining of the validity of the demurrer filed in the former suit, the plea should show by proper averments that the former judgment determined the rights set up in the new suit, and hence should set out what was involved and decided in the former suit. *Ib.* 721.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, though it appeared the first judgment was on demurrer it would be a bar to a subsequent suit, for it is settled law that it makes no difference in principle whether the facts were proved or were admitted; the admission even if by way of demurrer to a pleading was just as available to the opposite party as if the admission were made *ore tenus* before a jury. *Gould v. Evansville, etc., R. R. Co.*, 91 *U. S.* 526-534, 23 *L. ed.* 419, Oct. T., 1875, a case at law.

If the plaintiff failed on demurrer in his first action from the omission of an essential allegation in his declaration which was fully supplied in the second suit the judgment in the first suit was no bar for the enforcement of the same right. *Ib.* 534.

In a suit at law where the judgment in the former action is upon demurrer to the declaration the estoppel extends only to the exact point raised by the pleadings or decided; if the judgment be upon pleadings and proofs the estoppel extends to all that was necessarily involved in the issue. *Wiggins Ferry Co. v. Ohio, etc., Co.*, 142 *U. S.* 396-414, 35 *L. ed.* 1061, Oct. T., 1891.

Where a dismissal had been taken by complainant, if it subsequently appeared that the dismissal was under a mistake and inequitable to any defendant, it might be revoked, if application was seasonably made. *Ib.* 849.

Where the case has been dismissed if the court shall afterward discover that the supposed equitable ground upon which the order was based did not exist, it has the right to recall its order of dismissal so long as it retains control of the case. *Ib.*

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, when dismissal of the former bill was pleaded in bar, the record should be exhibited, as the matter is not responsive but affirmative matter of defense. *Bank v. Beverly*, 1 *How.* 134-151, 11 *L. ed.* 32.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, where counsel who appeared specially to challenge the jurisdiction of the court over the person of the defendant combined with his motion or plea to the jurisdiction of the court over his person a plea to the jurisdiction of the court as a court of equity it was not a waiver of insistence upon the special plea to the jurisdiction over the person. *Southern Pacific Co. v. Arlington Heights Fruit Co.*, 191 *Fed. R.* 101, 111 *C. C. A.* 581.

Held further when the defendant appeared specially for the express purpose of challenging the jurisdiction of the court over the person for want of proper service, or upon the ground the venue was not laid in his judicial district, although he combined in his motion or plea to the jurisdiction, matter going to the subject of the suit or action he did not thereby waive jurisdiction over his person. The purpose of the defendant's defense is to be gathered from the nature of his appearance. *Ib.*, p. 590.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, a rule of court which prescribed that if a party appeared specially he must stipulate that he will appear generally if the purpose for which the special appearance was made is not approved by the court, was inconsistent with the laws of the United States and its adoption by a Circuit (District) Court was not authorized by sec. 918, *Rev. Stats.* (*U. S. Comp. Stat.* 1901, p. 685.) *Davidson Marble Co. v. Gibson*, 213 *U. S.* 10, 53 *L. ed.* 675.

A party who is sued in the wrong district and does not waive the objection, may of right appear specially and object to the jurisdiction of the court and, the decision being against his objection, may of right bring the question directly to the Supreme Court. *Ib.*, p. 18.

NOTE. In this case the objection to the jurisdiction of the Circuit Court was made both by demurrer and by motion to quash the service and dismiss.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, when the bill set out a foreign grant of letters an answer denying all the allegations of the bill was sufficient to enable defendant to contest the right to sue. So held at the hearing. *Nulls v. Knapp*, 39 *Fed. R.* 592.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, a cause could not be dismissed as of course except under former Equity Rule 66. *Gregory v. Pike*, 67 *Fed. R.* 837-847, 15 *C. C. A.* 33.

RULE XXX—*Answer—Contents—Counter-Claim*

The defendant in his answer shall in short and simple terms set out his defense to each claim asserted by the bill, omitting any mere statement of evidence and avoiding any general denial of the averments of the bill, but specifically admitting or denying or explaining the facts upon which the plaintiff relies, unless the defendant is without knowledge, in which case he shall so state, such statement operating as a denial. Averments other than of value or amount of damage, if not denied, shall be deemed confessed, except as against an infant, lunatic or other person *non compos* and not under guardianship, but the answer may be amended, by leave of the court or judge, upon reasonable notice, so as to put any averment in issue, when justice requires it. The answer may state as many defenses, in the alternative, regardless of consistency, as the defendant deems essential to his defense.

The answer must state in short and simple form any counter-claim arising out of the transaction which is the subject-matter of the suit, and may, without cross-bill, set out any set-off or counter-claim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counter-claim, so set up, shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit both on the original and cross-claims.

The rule appears to be a substitute for Rules 39 to 44, inclusive, of the Rules adopted March 2, 1842.

Decisions

Defendant cannot make out one case in his answer and a different one by proof. *Boone v. Chiles*, 10 *Pet.* 177-209, 9 L. ed. 388.

The answer of an agent is not evidence against his principal, nor are his admissions *in pais* unless they are a part of the *res gestæ*. *Leeds v. Marine Ins. Co.*, 2 *Wheat.* 380-383, 4 L. ed. 266.

The answer of the attorney is not the answer of defendant himself. *Read v. Consequa*, 4 *Wash. C. C.* 174; *Fed. Cases*, 11,606.

The answer of one defendant is not evidence in behalf of another defendant. *Morris v. Nixon*, 1 *How.* 118, 11 L. ed. 69.

Where one defendant succeeds to another, so that the right of one devolves on the other, and they become privies in estate, the answer of the one defendant may be read in evidence against the other. *Osborne v. Bank*, 9 *Wheat.* 738-832, 6 L. ed. 204.

The rule does not apply where all the defendants are partners in the same transaction. *Van Reimsdyk v. Kane*, 1 *Gall.* 630; *Fed. Cases*, 16,872.

Denials or admissions in an answer should be specific and direct; it is not enough to allege that every allegation of the bill not expressly admitted is denied. *Holton v. Guinn*, 65 *Fed. R.* 450.

All the material allegations of the bill must be answered, and either admitted or denied. If defendant has no knowledge as to any fact alleged, he ought to state what his belief is on the subject if he has any; if he has none and cannot form any, he ought to say so, and call on plaintiff for proof of the alleged facts, or waive that branch of the controversy. *Brown v. Pierce*, 7 *Wall.* 205-211, 19 L. ed. 134.

The allegations of the bill may be denied in part and admitted in part, but the defendant is not at liberty to ignore any. *Commonwealth, etc., Co. v. Cummings*, 83 *Fed. R.* 767-768.

A denial that authority to do an act was given is not a sufficient answer to an averment of such authority unless subsequent assent thereto is also denied. *Clark v. Van Riemsdyk*, 9 *Cranch*, 153-161, 3 L. ed. 688.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, defendant could not in his answer introduce new matter in the nature of a cross-bill and require the plaintiff to answer it. *Morgan v. Tipton*, 3 *McLean*, 339; *Fed. Cases*, 9,809.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, on a hearing on bill and answer, allegations of new matter in the answer were to be taken as true. *Banks v. Manchester*, 128 *U. S.* 244-251, 32 L. ed. 425.

The defendant is bound by the admissions in his answer though he did not read it. *Putnam v. Day*, 22 *Wall.* 60-64, 22 L. ed. 764.

If the answer neither admits nor denies the allegations of the bill it must be proved. *Goring v. Grundy*, 6 *Cranch*, 51, 3 L. ed. 149.

A corporation answering under its corporate seal can be compelled to answer fully. *Gamewell, etc., Co. v. Mayor, etc.*, 31 *Fed. R.* 312; *Colgate v. Campagnie Francaise*, 23 *Fed. R.* 82.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, where the facts charged in the bill were clearly and positively denied by the answer, if uncontradicted, the answer was conclusive evidence. *Lenox v. Prout*, 3 *Wheat.* 520-527, 4 L. ed. 499; *Vigel v. Hopp*, 104 *U. S.* 441, 26 L. ed. 765.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, where the facts charged in the bill were proved by only a single witness, who was supported and corroborated by circumstances, the denial by sworn answer might be overcome. *Union Bank v. Geary*, 5 *Pet.* 99-111, 8 L. ed. 60.

Where the answer admits a fact, but insists on matter of avoidance, the complainant need not prove the fact admitted, but defendant must prove the matter in avoidance. *Clarke v. White*, 12 *Pet.* 178-190, 9 L. ed. 1046.

When the answer replied to admits a fact and insists on a distinct fact by way of avoidance the fact admitted is established but the fact insisted on must be proved, otherwise the admission stands as if the fact in avoidance had not been averred. *Clements v. Nicholson*, 6 *Wall.* 299, 18 L. ed. 789. Also cited as *Clements v. Moore*.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, if the answer relied upon new matter in avoidance not responsive to the bill, defendant must establish it by proof; the answer as to such matter is not evidence. *Randall v. Phillips*, 3 *Mason*, 378; *Fed. Cases*, 11,555.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, where the answer neither admitted nor denied material allegations of the bill, complainant must prove his averments. *Rogers v. Marshall*, 13 *Fed. R.* 59-64.

Where charges of fraud are made on information and belief and the only evidence to support them is the similarity of names, such charges are not sustained. *Monroe Cattle Co. v. Becker*, 147 *U. S.* 47-55, 37 L. ed. 72.

By the former practice prior to the revision at the October Term, 1912, when defendant in his answer denied knowledge, information or belief, as to an allegation of the bill "wherefore he denies the same" the answer was not evidence requiring two witnesses to overcome. *The Holiday Case*, 27 *Fed. R.* 830.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, where the answer was responsive to the bill to entitle

the plaintiff to relief, the allegations therein must be sustained by the testimony of two witnesses or of one witness and corroborating circumstances. *Vigell v. Hopp*, 104 U. S. 441-442, 26 L. ed. 765.

An answer which neither admits nor denies matters alleged in the bill may have a tendency to prove the allegations in the bill. Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, such an answer made it necessary to introduce only one witness to overcome the defense. *Pierce v. Brown*, 7 Wall. 205-211, 19 L. ed. 136.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, matter alleged in the bill which the answer neither denied nor avoided must be proved, as former Rule 61 provided that if no exception to the answer be filed within the period prescribed the answer should be taken to be sufficient. *Ib.* 211.

Material allegations in the bill ought to be answered and admitted or denied, if the facts are within the knowledge of respondent, and if not he ought to state what his belief is upon the subject, if he has any, and if he has none, and cannot form any, he ought to say so and call on complainant for proof of the alleged facts, or waive them; a mere statement of respondent that he has no knowledge that the fact is as stated, without any answer as to his belief concerning it, is not such an admission as is to be received as full evidence of the fact. *Ib.* 211-212.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, where the answer was not responsive to the bill and not sustained by other proof, the testimony of two witnesses was not required to overcome it. *Seitz v. Mitchell*, 94 U. S. 580-582, 24 L. ed. 179.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, if a bill did not contain specific interrogatories the complainant must be satisfied with such answer to its allegations as fairly and substantially met them. The defendant is not bound to exercise ingenuity in finding out all the aspects in which a statement may be taken. *Parsons v. Cumming*, 1 Woods, 461; *Fed. Cases*, 10,775.

If it was apparent that the defendant had omitted to answer any material allegation or had evaded giving an answer, or had answered disingenuously, the court would compel him to file another answer. *Ib.*

Leave to amend an answer is in the discretion of the court. Applications to reform an answer are viewed more favorably than if to substitute a new one, which is only allowed where the court is satisfied that the purposes of justice require it. *Castor v. Wood*, *Bald.* 289; *Fed. Cases*, 2,505.

The court may examine into the facts averred, and also into the evidence already taken, if any, before granting leave to file an amended

answer or answer and cross-bill. *Richie v. MacMullen*, 79 *Fed. R.* 522-529, 25 *C. C. A.* 50.

A material amendment of an answer changing the issues ought not to be permitted after the evidence is closed, unless it is made to appear in the evidence already offered, or a showing on affidavits that the defendant can probably sustain the new issues by proof. *Ib.* 529.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, after replication or setting the bill down for hearing, amendments were in the discretion of the court, which is not as easily moved to grant an amendment on material matters as before the issues are made up. *Gubbins v. Laughtenschlager*, 75 *Fed. R.* 615-619.

After the master's report and exceptions thereon heard, amendments to the answer which are immaterial, or where the equities are entirely against the defendant's claims, will not be allowed. *Hudson v. Randolph*, 66 *Fed. R.* 216-218, 13 *C. C. A.* 402.

Courts are slow to allow amendment in material facts, or to change essential grounds taken in the original answer. *Smith v. Babcock*, 3 *Summ.* 583; *Fed. Cases*, 13,008.

To support such application, they require very cogent circumstances, and such that will repel the idea of an attempt to evade the justice of the case, or to set up new defenses or subterfuges. *Ib.*

Where the new facts sought to be introduced are documentary the reason does not apply in full force. *Ib.*

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, former Rule 60 should be administered in analogy to the requirements of former Rule 29; and where it appeared that the matter of the proposed amendment could with reasonable diligence have been sooner introduced into the answer, leave to file should be denied. *India R. C. Co. v. Phelps*, 8 *Blatchf.* 85; *Fed. Cases*, 7,025.

There are cases where amendments are permitted at any stage of the cause; but amendments which change the character of the answer so as to make a substantially new case, should rarely be allowed after the cause is set for hearing. *Walden v. Bodley*, 14 *Pet.* 156-160, 10 *L. ed.* 398.

If the amended answer repeats the averments of the former answer, unless they vary the defense in point of substance, or are otherwise necessary, it will be considered as impertinent and, on reference, such parts should be struck out. *Gier v. Gregg*, 4 *McLean*, 202; *Fed. Cases*, 5,406.

Where a supplemental answer contains not only the new matter which the party has obtained leave to allege, but also other matter

which was contained in a former answer, the amended answer may be ordered off the files on motion. *Allis v. Stowell*, 5 *Fed. R.* 203-205.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, a plaintiff filing a bill in the Federal court could not set up as a defense in an answer to a cross-bill by the defendant, that a State court had acquired prior jurisdiction on bill brought in that court by the plaintiff in such cross-bill. *Brandon Mfg. Co. v. Prime*, 14 *Blatchf.* 371; *Fed. Cases*, 1,810.

A cross-bill for relief as well as defense might make defendants, persons not parties to the original bill where they were necessary to complete relief. *Ib.*

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, a cross-bill was properly filed to establish an equitable title to property, the legal title to which was in the complainant. *Ib.*

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, a bill and cross-bill did not constitute one suit so that the service of subpoena on defendant in a cross-bill was unnecessary to bring them into court. *Lowenstein v. Glidewell*, 5 *Dillon*, 325; *Fed. Cases*, 8,575.

Service of subpoena to answer a cross-bill could not be made upon the solicitor of the plaintiff in the original bill. *Ib.*

Under the rules in force prior to the revision promulgated November 4, 1912, *Held* further in the United States court there were two exceptions to this rule: (1) in cases of injunction to stay proceedings at law; (2) in cross-suits in equity, where the plaintiff at law in the first, and the plaintiff in equity in the second, case resided beyond the jurisdiction of the court. *Ib.*

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, without the aid of a cross-bill a court was not authorized to decree against the complainant the opposite of the relief sought by the bill. *Washington Railroad v. Bradley*, 10 *Wall.* 299-303, 19 *L. ed.* 894.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, a cross-bill might be filed to establish an agreement or conveyance which the original bill sought to set aside. *Carcochan v. Christy*, 11 *Wheat.* 446-467, 6 *L. ed.* 516.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, where defendant is advised that the complainant is a mere nominal party, and that the real party is a citizen of the same State with the defendant, he might file a cross-bill for a discovery. *Young v. Pott*, 4 *Wash. C. C.* 521; *Fed. Cases*, 18,172.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, where the final decree made was inconsistent with an interlocutory decree granting affirmative relief upon a cross-bill in the same suit, a right of appeal lies. *Ex parte* Railroad Co., 95 U. S. 221-225, 24 L. ed. 357.

Where a petition is filed, or other pleading which has the same effect as if presented by a cross-bill, and the same is heard, and proofs taken thereon without objection, it will be held that the parties have assented to having their rights decided in such pleading, and the court will not require technical and formal proceedings, unless they are required by some fixed principles of equity law or practice which the court would not be at liberty to disregard. *Coburn v. Cedar Valley L. Co.*, 138 U. S. 196-222, 34 L. ed. 876; *Kelsey v. Hobby*, 16 Pet. 269-277, 10 L. ed. 961.

Though a corporation need not answer under oath, it is subject to discovery and must make it under seal. *Monarch Vacuum Cleaner Co. v. Vacuum Cleaner Co.*, 194 Fed. R. 172.

The answer of a corporation when verified by an officer was evidence under old equity rules, *Held*, it was not available to prove an affirmative defense. *Seitz v. Mitchell*, 94 U. S. 580-582, 24 L. ed. 179.

RULE XXXI—*Reply—When Required—When Cause at Issue*

Unless the answer assert a set-off or counter-claim, no reply shall be required without special order of the court or judge, but the cause shall be deemed at issue upon the filing of the answer, and any new or affirmative matter therein shall be deemed to be denied by the plaintiff. If the answer include a set-off or counter-claim, the party against whom it is asserted shall reply within ten days after the filing of the answer, unless a longer time be allowed by the court or judge. If the counter-claim is one which affects the rights of other defendants they or their solicitors shall be served with a copy of the same within ten days from the filing thereof, and ten days shall be accorded to such defendants for filing a reply. In default of a reply, a decree *pro confesso* on the counter-claim may be entered as in default of an answer to the bill.

A new Rule promulgated November 4, 1912.

Decisions

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, where a cause was set down for hearing on the bill and answer, no replication having been filed, the answer whether responsive or not, was to be taken as true, otherwise the defendant would be precluded from proving the allegations which were only defensive. *Lake Erie & W. R. Co. v. Indianapolis Nat. Bank*, 65 *Fed. R.* 690.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, a decree must conform to the allegations of the bill as well as to the proofs. Where the answer which was proved made a complete defense to the averments of the bill and the complainants filed a special replication setting up new matter in avoidance of the answer, *Held*, that complainants should have amended their bill; that the act for regulating process in the Federal courts adopts in equity cases the principles, rules, and usages of the Court of Chancery of England by which a new case cannot be made in a replication to an answer in chancery. *Vattier v. Hinde*, 7 *Pet.* 252-274, 8 *L. ed.* 683, Jan. T., 1833.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, all the allegations of the defendant's answer must be proved, since all new matter set up in the answer was denied by the filing of a general replication. *Humes v. Scrubs*, 94 *U. S.* 22-24, 24 *L. ed.* 51.

RULE XXXII—Answer to Amended Bill

In every case where an amendment to the bill shall be made after answer filed, the defendant shall put in a new or supplemental answer within ten days after that on which the amendment or amended bill is filed, unless the time is enlarged or it is otherwise ordered by a judge of the court; and upon a default, the like proceedings may be had as upon an omission to put in an answer.

An amendment of Rule 46 of the Rules adopted March 2, 1842.

Decisions

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, any amendment of a bill after answer authorized the defendant, though not required to answer, to put in an answer, and the defendant had the same time to answer that he originally had, in the absence of agreement or a rule of court. *Nelson v. Eaton*, 66 *Fed. R.* 376-378, 13 *C. C. A.* 523.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held* the general rule was that an amendment of the bill gave the defendant the right to answer as if he had not answered before. *French v. Hay*, 22 *Wall.* 238-246, 22 L. ed. 856.

If the amendment introduces no new facts and the merits are not affected, plaintiff may proceed without answer to the amendment. *Longworth v. Taylor*, 1 *McLean*, 514; *Fed. Cases*, 8,491.

RULE XXXIII—*Testing Sufficiency of Defense*

Exceptions for insufficiency of an answer are abolished. But if an answer set up an affirmative defense, set-off or counter-claim, the plaintiff may, upon five days' notice, or such further time as the court may allow, test the sufficiency of the same by motion to strike out. If found insufficient but amendable the court may allow an amendment upon terms, or strike out the matter.

A new Rule promulgated November 4, 1912.

Decisions

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, it was not sufficient foundation for an exception to an answer that a fact charged in the bill was not answered, unless the fact was material and might contribute to support the equity of the case made in the bill. Exceptions for insufficiency should not be sustained, unless there were some material allegation in the bill not therein fully answered. *Hardeman v. Harris*, 7 *How.* 726-729, 12 L. ed. 890.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, an allegation in the bill not noticed in the answer was to be proved by complainants in the absence of exceptions. *Lovell v. Johnson*, 82 *Fed. R.* 206.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, an answer containing a substantive defense but not responsive to the plaintiff's allegations in his bill was not the subject of exceptions. *Adams v. Bridgewater Iron Co.*, 6 *Fed. R.* 179-180.

The objection by exceptions applied only to an insufficient discovery, or to scandal and impertinence. *Ib.* 180.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, an exception to an answer for insufficiency raised not

the question of the sufficiency of the answer in point of law, but only the question as to whether sufficient discovery had been made by the defendant or the averments fully answered; if such complete answer had been made, exceptions to new matter therein would not lie for insufficiency; if the sufficiency of an answer as a defense was to be tested the case must have been set down for hearing on bill and answer. *Pennsylvania Co. v. Bay*, 138 *Fed. R.* 203-206.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, the only way in which the sufficiency of the answer (as a defense) to a bill in equity could be tested was by setting the case down for hearing on bill and answer. *Grether v. Wright*, 75 *Fed. R.* 742, 23 *C. C. A.* 498.

Where a demurrer was filed to an answer without objection, it might be treated as an application to set down the cause on bill and answer, when all averments of fact properly pleaded in the answer were admitted by the complainant, and his right to test them by proof was waived. *Ib.* 744.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, further, an exception to the answer on the ground that certain allegations of the bill were not answered, admitted, or denied, should be sustained if the facts charged were material. *Ib.* 728.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, when the answer denied that the defendant had any knowledge of the facts alleged in the bill, but omitted to state that he had no information or belief as to those facts, it was good cause for exception. *Bradford v. Geiss*, 4 *Wash. C. C.* 513; *Fed. Cases*, 1,768.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, filing of exceptions was not the only mode of testing the sufficiency or regularity of the answer. In certain cases these objections might be raised by motion to strike the answer from the files. *Allis v. Stowell*, 5 *Fed. R.* 203-205.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, exceptions for insufficiency should set out verbatim the charges in the bill (and the interrogatories relating thereto) to which the answer was responsive, and also the terms of the answer so as to point out to the court wherein it was insufficient. *Brookes v. Byan*, 1 *Story*, 296; *Fed. Cases*, 1,947.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, exceptions for impertinence were only allowed, where the matter excepted to was not material or relevant, or was stated with needless prolixity. Although evasive, if it responded to any allegation

in the bill, it might be insufficient, but was not impertinent. *Chapman v. School District, Deady*, 108; *Fed. Cases*, 2,607.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, upon the hearing upon exceptions to an answer the facts alleged in the bill and in the answer were considered as admitted, and only matter of law was presented for decision, as in a case set down on bill and answer. *Re Sanford Fork & Tool Co.*, 160 *U. S.* 247-257, 40 *L. ed.* 417, Oct. T., 1895.

Where the exceptions to an answer were to its sufficiency to constitute a defense and no objection was made that such sufficiency should be questioned by setting the case down on bill and answer, if the exceptions were sustained the court cannot do more than order that a complete answer be put in, on pain of being held to have confessed the bill. *Ib.* 258.

If the answer be adjudged sufficient the complainant could not be deprived of the right to file a replication thereto. *Ib.* 258.

RULE XXXIV—*Supplemental Pleading*

Upon application of either party the court or judge may, upon reasonable notice and such terms as are just, permit him to file and serve a supplemental pleading, alleging material facts occurring after his former pleading, or of which he was ignorant when it was made, including the judgment or decree of a competent court rendered after the commencement of the suit determining the matters in controversy or a part thereof.

Apparently a substitute for Rules 56 and 57 of the Rules adopted March 2, 1842.

Decisions

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, where in consequence of an act performed by himself after commencement of suit, a person becomes a necessary party, the proper proceeding to bring him into court was an original bill in the nature of a supplemental bill. *Winter v. Ludlow*, 16 *Leg. Int.* 332; *Fed. Cases*, 17,891.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, a supplemental bill might be filed at any stage of the cause. *Parkhurst v. Kinsman*, 2 *Blatchf.* 72; *Fed. Cases*, 10,758.

Under former Rule 57 the application for leave to file could not be defeated by showing that the petition did not make a case for equitable relief. *Ib.*

Held, the petition need not embrace the averments intended to be inserted in the supplemental bill, but need only advise the court and the opposite party, whether probable cause exists for the new proceedings. *Ib.*

The court may deny leave to file a supplemental bill, yet permit an amendment of the original bill. *Ib.*

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, a supplemental bill will not be allowed merely to enable the complainant to drop some of the defendants to the original bill, when such change of parties is not essential. *Musgrove v. Kountze*, 14 *Fed. R.* 315-318.

Leave to file will not be given after a decree, where the purpose is to set up matters which might with due diligence have been pleaded by way of amendment in the original suit. *Ib.*

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, no new evidence is sufficient foundation for a supplemental bill unless it be of such nature that, if unanswered, it would require a reversal of the decree. *Jenkins v. Elridge*, 3 *Story*, 299; *Fed. Cases*, 7,267.

After an interlocutory decree upon prayer to file a bill in the nature of a bill of review for the purpose of presenting newly discovered evidence and matters which have arisen *pendente lite*, *Held*, if the petition was maintained at all, it should be for leave to file a supplemental bill to bring forward new evidence and for a rehearing, when the supplemental bill should also be ready for hearing. *Ib.*

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, any material fact which has arisen since the filing of the original bill should be supplied by supplemental bill. *Copen v. Flesher*, 1 *Bond*, 440; *Fed. Cases*, 3,211.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, in any case of the purchase or transfer of an interest *pendente lite*, a supplemental bill may be filed by or against the purchasers. *Hoxie v. Carr*, 1 *Sum.* 173; *Fed. Cases*, 6,802.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, leave to file a supplemental bill to introduce newly discovered matter should not be allowed when it appears that the new facts or circumstances were known to complainant when the original bill was filed. *City of Omaha v. Redick*, 63 *Fed. R.* 1-5, 11 *C. C. A.* 1.

Nor does the happening of anything, which if known at the date of the entry of the interlocutory decree would not have led to any modification in its terms, entitle a party to file a supplemental bill. *Ib.* 5.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, a defective original bill which afforded no ground for proceeding upon it could not be sustained by filing a supplemental bill founded upon matters which had subsequently taken place. *Putney v. Whitmire*, 66 *Fed. R.* 385-388.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, if the original bill was well founded a supplemental bill might be filed upon facts which have occurred subsequently showing a right to further and similar relief. *New York, S. & T. Co. v. Lincoln St. Ry. Co.*, 74 *Fed. R.* 67-68.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, a supplemental bill might be maintained even if the citizenship of the parties would oust jurisdiction of an original bill. *Miller v. Rogers*, 29 *Fed. R.* 401.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, where the events happened before the filing of the bill, but were not discovered until after, the facts might be set up and additional relief asked by a supplemental bill. *Nevada Nickel Syndicate v. National Nickel Co.*, 86 *Fed. R.* 486-488.

Plaintiff will not be entitled to present an entirely new case by way of supplemental bill. *Snead v. M'Coull*, 12 *How.* 407-422, 13 L. ed. 1043.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, in a suit for infringement of patent after entry of interlocutory decree, the filing of a supplemental bill in the nature of a bill of review is not the proper way to introduce newly discovered evidence. The proper practice is by petition for rehearing. *Potts & Co. v. Creager*, 71 *Fed. R.* 574-575.

Under peculiar circumstances, established by affidavits, a supplemental bill was allowed to be filed after affirmance on appeal of a decree, such bill being in the nature of a bill of review, based upon newly discovered evidence. *Municipal Signal Co. v. Gamewell F. A. T. Co.*, 77 *Fed. R.* 452-453.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, petition for leave to file a supplemental bill in the court below might be entertained in the appellate court. *In re Gamewell F. A. T. Co.*, *Ib.*

After receipt of a mandate by the Circuit (District) Court, that court will decline to entertain a petition for leave to file a supplemental bill in the nature of a bill of review without leave of the appellate court. *Ib.* 453.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, former Rule 57 applied to the case of a transfer of the cause of action, by voluntary deed, or contract, as well as by operation of law. *Hazeltine T. B. Co. v. Citizens' St. Ry. Co.*, 72 *Fed. R.* 325-327.

An assignee of plaintiff's interest pending suit may obtain the benefit of proceedings already had, by obtaining leave to file a bill in the nature of a supplemental bill. *Ib.* 329.

Such bill may be filed even after final hearing. *Ib.*

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, where the plaintiff has assigned his whole interest to another, pending suit, the benefit of the proceedings cannot be obtained by an assignee by means of a supplemental or amended bill; he must file an original bill in the nature of a supplemental bill. *Ross v. City of Ft. Wayne*, 58 *Fed. R.* 404-406.

It is immaterial that the bill is entitled a supplemental and amended bill, if it contains the material averments which make it an original bill in the nature of a supplemental bill. *Ib.* 406.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, upon a supplemental bill a subpoena to answer was not required unless new parties were made. A rule upon the parties already served, to answer the supplemental bill, is sufficient. *Shaw v. Bill*, 95 *U. S.* 10-14, 24 *L. ed.* 333.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, where the original bill was sufficient to entitle complainant to relief, and facts subsequently occur which entitle him to other or more extensive relief, he might be allowed to file a supplemental bill. *Sheffield, etc., Co. v. Neuman*, 77 *Fed. R.* 787-791, 23 *C. C. A.* 459.

The granting of leave to file a supplemental bill, or to amend the original bill, is discretionary. *Ib.* 791.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, where an insolvent corporation had by decree been dissolved and a statutory assignee appointed, pending suit against the corporation, such suit could not proceed without a supplemental bill in the nature of a bill of revivor. *Chester v. Life Ass'n of America*, 4 *Fed. R.* 487-489.

In such case the statutory assignee might be brought into the pending suit by a supplemental bill in the nature of a bill of revivor. *Ib.* 489.

A supplementary answer is the proper course where a new defense is discovered after putting in the answer but which existed before. If the fact was known to the party at the time of the original answer and omitted therefrom, leave to file a supplementary answer will be denied, especially if the new matter is calculated to embarrass the case, and not

essential to the defense. *Suydam v. Truesdale*, 6 *McLean*, 459; *Fed. Cases*, 13,656.

Where *pendente lite* a party has assigned his whole interest in the subject-matter of a suit, the adverse party can object that the suit has abated as to such assignor, but after becoming acquainted with the facts of such assignment he may waive his objection. *Ib.*

RULE XXXV—*Bills of Revivor and Supplemental Bills Form*

It shall not be necessary in any bill of revivor or supplemental bill to set forth any of the statements in the original suit, unless the special circumstances of the case may require it.

Same as Rule 58 of the Rules adopted March 2, 1842.

RULE XXXVI—*Officers Before Whom Pleadings Verified*

Every pleading which is required to be sworn to by statute, or these rules, may be verified before any justice or judge of any court of the United States, or of any State or Territory, or of the District of Columbia, or any clerk of any court of the United States, or of any Territory, or of the District of Columbia, or any notary public.

An amendment of Rule 59 of the Rules adopted March 2, 1842.

Statutory Provisions

Sec. 268, Judicial Code. Courts of the United States have power to administer oaths.

Rev. Stats., sec. 1778, *U. S. Comp. Stats.* 1901, p. 1211. Notaries public given the same power to administer oaths which by law justices of the peace had.

Act Aug. 15, 1876, ch. 304, 19 *Stat. L.* 206. Notaries public authorized to take affidavits with the same effect as commissioners of Circuit Courts.

Rev. Stats., sec. 1750, *U. S. Comp. Stats.* 1901, p. 1196. Every consular officer is empowered to administer oaths and to perform any notarial act.

Decisions

Rev. Stats., sec. 1778 (*U. S. Comp. Stats.* 1901, p. 1211), does not in terms require the signature of the notary to be attested by his official seal. A court may require evidence that the officer taking a jurat was a

notary, but the absence of the seal is at most an irregularity. *The E. W. Gorgas*, 10 *Ben.* 460; *Fed. Cases*, 4,585.

RULE XXXVII—*Parties Generally—Intervention*

Every action shall be prosecuted in the name of the real party in interest, but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party expressly authorized by statute, may sue in his own name without joining with him the party for whose benefit the action is brought. All persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs, and any person may be made a defendant who has or claims an interest adverse to the plaintiff. Any person may at any time be made a party if his presence is necessary or proper to a complete determination of the cause. Persons having a united interest must be joined on the same side as plaintiffs or defendants, but when anyone refuses to join, he may for such reason be made a defendant.

Anyone claiming an interest in the litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding.

A new Rule promulgated November 4, 1912.

Decisions

As a general rule no one can be admitted as a party defendant over the objection of complainant; to this rule there are exceptions. *Chester v. Life Ass'n of America*, 4 *Fed. R.* 487-491.

The complainant cannot be compelled to add new parties to his bill if he chooses to take the responsibility of their omission. *Searles v. J. P. & M. R. Co.*, 2 *Woods*, 621; *Fed. Cases*, 12,586.

The Act of 1839 and *Rev. Stats.*, sec. 738 (*U. S. Comp. Stats.* 1901, p. 587), allowing publication in proceedings on liens on specific property only puts the case in the same condition as if the absent defendant had appeared. *Ib.*

Where no relief is sought against parties connected with the subject-matter of the suit, they should not be made defendants. *French v. Shoemaker*, 14 *Wall.* 314, 323, 335, 20 *L. ed.* 852.

The objection for want of parties may be taken at the hearing, yet the objection ought not to prevail upon the final hearing on appeal, except in very strong cases when the court perceives that a necessary and indispensable party is wanting. The objection should be taken at an earlier stage of the case. *Mechanics' Bank v. Seton*, 1 *Pet.* 299-306, 7 L. ed. 155, Jan. T., 1828.

The rule that persons materially interested ought to be parties, either plaintiffs or defendants, is for the convenient administration of justice and within the discretion of the court. The relief granted will always be so modified as not to affect the interests of absent parties. *Ib.* 306.

A court is not bound to take notice of any interest acquired in the subject-matter of a suit pending the litigation. *Ib.* 310.

It is not indispensable that all parties should have an interest in all the matters contained in the suit. It will be sufficient if each party has an interest in some material matters in the suit and they are connected with the others. *Brown v. Safe Deposit Co.*, 128 *U. S.* 403-412.

An assignment by a defendant of his interest in litigation does not defeat a suit. His assignee is bound by what has been done. He may come in on application and assume the litigation in his own name or he may act in the name of his assignor, for which he has the implied license by the assignment. *Ex parte Railroad Co.*, 95 *U. S.* 221-226, 24 L. ed. 357.

It is common in equity practice to permit a party who becomes interested in the subject-matter of a suit during its pendency to come in to protect his interests if application is seasonably made. *The Jenny Lind*, 3 *Blatchf.* 513; *Fed. Cases*, 7,287.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, a bill filed against the executors of an estate and all those who purchased from them was not for that reason multifarious.

All having an interest in the principal matter in controversy should be joined, though the interests may have arisen under distinct contracts. *Gaines v. Chew*, 2 *How.* 619-642, 11 L. ed. 619.

A party interested in the subject-matter of a suit, not made a party in the bill, may on his motion or petition, be made a party and complainants may be required to amend their bill making such party a defendant. *Scott v. Mansfield, etc., R. Co.*, 5 *Am. L. R.* 436; *Fed. Cases*, 12,541.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, a bill might be dismissed where the plaintiff when called upon to make proper parties refused, or unreasonably delayed

doing so; that it must be done on demurrer, plea, or answer pointing out the persons who ought to have been made parties. *Greenleaf v. Queen*, 1 *Pet.* 138-149, 7 L. ed. 85.

Those whose interests are in harmony and only those, should be joined as plaintiffs. *Bunce v. Gallagher*, 5 *Blatchf.* 481; *Fed. Cases*, 2,133.

It is immaterial whether the interests of defendants are or are not in conflict with each other. *Parsons v. Lyman*, 4 *Blatchf.* 432; *Fed. Cases*, 10,779.

The jurisdiction depends upon the state of things at the time the action is brought, and after it is once vested cannot be ousted by subsequent events. *Mollan v. Torrance*, 9 *Wheat.* 537-539, 6 L. ed. 194.

No one need be made a party against whom the plaintiff can have no decree, upon the case made by the bill and proof. *Van Reimsdyk v. Kane*, 1 *Gall.* 371; *Fed. Cases*, 16,871.

Where it would oust the jurisdiction of the court to make a party plaintiff, he may on application, be made a party defendant where he can equally have the benefit of the suit. *Brown v. Pac. Mail SS. Co.*, 5 *Blatchf.* 525; *Fed. Cases*, 2,025.

Where the interest of A. is involved in that of B., and A. possesses the legal right, so that the interest may be asserted in his name, it is not always necessary to bring both before the court. *Hopkirk v. Page*, 2 *Brock.* 20; *Fed. Cases*, 6,697.

Where the wife complains of the husband and asks relief against him, she must file her bill by her next friend. *Binn v. Heath*, 6 *How.* 248, 12 L. ed. 416.

The creditors are not necessary parties to a bill filed by an executor against a devisee of lands charged with the payment of debts, for an account of the trust fund, because the fund may be brought into court, and distributed according to the rights of those who apply for it. *Potter v. Gardner*, 12 *Wheat.* 498-501, 6 L. ed. 716.

The fact that an administrator, in a suit by a distributee to recover an aliquot share, is ordered to account before a master, does not require all who are entitled to distribution to be made parties. If they do not appear before the master no decree for or against them can be made; if they appear and there are controverted matters between them and the administrator, outside the mere accounting, such matters can only be determined on proper pleadings. *Hook v. Payne*, 14 *Wall.* 252-255, 20 L. ed. 887.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, new parties could not be introduced into a cause by a cross-bill. If a plaintiff desires to make new parties he must amend his bill. If a defendant requires their presence he takes the objection of non-joinder and the complainant is forced to amend, or his bill is dismissed. *Shields v. Barrow*, 17 *How.* 130-145, 15 L. ed. 158.

Where after the cause was set for hearing defendant was informed that the plaintiff was a nominal party and that the real plaintiff was a citizen of the same State with the defendant, and he immediately filed a cross-bill charging this and asking a discovery, it was held that the original suit ought not to be heard until the cross-bill was answered. *Young v. Pott*, 4 *Wash. C. C.* 521; *Fed. Cases*, 18,172.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, a cross-bill was in the nature of a defense and could only be filed by a party to the cause. A stranger to the cause might not file a cross-bill though he petition to be made a party to the suit, with leave to file a cross-bill, if the subject-matter of the proposed cross-bill embraced matter independent of the original bill. *Thruston v. Big Stone Gap Imp. Co.*, 86 *Fed. R.* 484-485.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, to a bill to foreclose a mortgage against the corporation, bondholders might not file a petition in the nature of a cross-bill seeking to recover damages of the complainant, because of the execution of a trust. *Fidelity Trust & S. V. Co. v. Mobile St. Ry. Co.*, 53 *Fed. R.* 850-852.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, where a cross-bill was necessary to the defense of the party filing it, and was filed against parties already before the court and subject to its jurisdiction, either plaintiffs or defendants in the original suit, a cross-bill would be sustained, although the parties, plaintiff and defendant therein, or some of them, were citizens of the same State. *Schenck v. Peay*, *Woolw.* 175; *Fed. Cases*, 12,450.

Where there is a nominal plaintiff and a real plaintiff the citizenship of the real plaintiff is alone to be considered upon the question of jurisdiction. *Howard v. United States*, 184 *U. S.* text 680-681, 46 L. ed. 757.

Where plaintiffs assert a joint claim and title with others and receive a joint judgment for their undivided interests, unless there is some Federal question involved in the suit, to support the jurisdiction, they cannot support jurisdiction on the ground of diversity of their citizenship

unless all the plaintiffs are entitled to sue in the Federal court. *Florida Central, etc., Co. v. Bell*, 176 *U. S.* 321-333, 44 L. ed. 491.

If the bill allege the complainants are "citizens of the republic of France" it is sufficient to confer jurisdiction, without any other averment of alienage. *Hennessey v. Richardson Drug Co.*, 189 *U. S.* 25-34, 47 L. ed. 697.

An averment that plaintiff "is a resident of (the State of) Washington and a citizen of Sweden," *Held* to confer jurisdiction on the Federal court. *Nichols Lumber Co. v. Franson*, 203 *U. S.* 278, 51 L. ed. 181.

Under the Act of Aug. 13, 1888, c. 886, sec. 1, 25 *Stat.* 433 (*U. S. Comp. Stat.* 1901, p. 508, sec. 24, paragraph 1, Judicial Code) providing that no District Court shall have cognizance of any suit to recover on a chose in action in favor of any assignee unless such suit might have been prosecuted in such court if no assignment had been made, the requirement of the statute is satisfied if by the averments and proof it appears both the mortgagee, the complainant and this immediate assignor were entitled to sue in the Federal court. *Farr v. Hobe Peters Land Co.*, 188 *Fed. R.* 10, 110 *C. C. A.* 160-166.

Neither the language of the statute nor its apparent purpose requires like qualification on the part of the intermediate assignees, in the absence of evidence that subsequent assignments were merely colorable for evasion of the statutory limitation. *Ib.*

A suit to quiet title to land founded upon complainant's equities as assignee of an unforeclosed mortgage derived through successive assignments from the original mortgagee is a suit to recover the contents of a chose in action. *Ib.*

Applications to intervene are of two kinds. One where the applicant has other means of redress open to him, and there it is within the court's discretion to refuse to encumber the main case with collateral inquiries. The other where the applicant's claim of right is such that he can never obtain relief unless it be granted in the pending case on intervention, and here the right to intervene is absolute and rejection of the petition is a final adjudication and appealable. *United States Trust Co. v. Chicago, etc., Co.*, 188 *Fed. R.* 292, 110 *C. C. A.* 270-274.

A petition for intervention need not be as formal as a bill of complaint, yet it should exhibit all the material facts relied on for the relief invoked, embodying by recital or reference so much of the record in the original suit as is essential to show a right to the particular relief demanded. *Empire Distilling Co. v. McNulta*, 77 *Fed. R.* 700-703, 23 *C. C. A.* 415.

Material proceedings subsequent to the filing of the petition should be incorporated by amendment. *Ib.* 703.

All persons having a distinct interest must be brought into court. Where the interest of one person is involved in that of another and that other possesses the legal right, so that the interest may be asserted in his name it is not always necessary to bring both before the court. *Hopkirk v. Page*, 2 *Brock*. 20; *Fed. Cases*, 6697.

The person having the equitable interest may insist on being made a party. *Ib.*

No one need be made a party complainant in whom there exists no interest, and no one a party defendant from whom nothing is demanded. *Kerr v. Watts*, 6 *Wh.* 559, 5 *L. ed.* 330.

It is not enough that a court of equity causes nothing but the interest of a party to the cause to change owners. Its decree should terminate and not instigate litigation. *Candwell v. Taggart*, 4 *Pet.* 190-202, 7 *L. ed.* 828. Illustrative cases given.

The assignment by a defendant of his interest in litigation does not defeat a suit. The assignee may come in and be made a party or act in the name of his assignor, from whom an implied license is given by the assignment. *Ex parte Railroad Co.*, 95 *U. S.* 221, 24 *L. ed.* 357.

Held, a voluntary transfer of all interest in subject-matter of the litigation to a citizen of the same State as defendant ousts jurisdiction. *Adams E. & Co. v. Denver, etc., Co.*, 16 *Fed. R.* 712-716. *Contra Glover v. Sheppard*, 21 *Fed. R.* 481.

The first case cites 8 *Pet.* 1, 12 *Pet.* 164, 2 *Wh.* 290.

The second case cites 12 *Pet.* 164, 8 *Pet.* 1, 2 *Wh.* 296, 14 *How.* 586, 24 *How.* 450, and says there is no adjudged case in point, but does not refer to 16 *Fed. R.* 712.

RULE XXXVIII—*Representatives of Class*

When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole.

An amendment of Rule 48 of the Rules adopted March 2, 1842.

Decisions

Where the parties are very numerous, or unknown, and to bring all before the court would impede justice, a court of equity will dispense with those not indispensable. *Mandeville v. Riggs*, 2 *Pet.* 482-487, 7 *L. ed.* 493.

Equity Rule 39 expressly reserves the rights of absent parties; so held of former Rule 48. *Coann v. Atlantic C. F. Co.*, 14 *Fed. R.* 4-8.

Whenever an interested party is without the jurisdiction, or where a party is entitled to a specific sum or share only, in a trust fund, or where the bill itself seeks a discovery of the necessary parties, if it is obvious that the form of the suit cannot be bettered the court will dispense with parties; also where the parties are very numerous, and the court sees it is impossible to bring them all before the court; or where upon a matter of general interest a few sue for the benefit of the whole, or where part of an association, public or private, who fairly represent the right contest for the whole, if the bill is brought on behalf of all interested, the court will proceed to a decree. *West v. Randall*, 2 *Mason*, 181; *Fed. Cases*, 17,424.

Suits may be brought against a voluntary association by service of process upon sufficient members, to fairly represent the association, and to answer all practical purposes, if the orders and decrees are asked against a union or association; as defendants, members as distinguished from officials, may represent a union or association. *Amer. Steel & W. Co. v. Wire Drawers, etc., Unions*, 90 *Fed. R.* 598-607.

In suits affecting the rights of residuary legatees or of next of kin the general rule is all the members of a class must be made parties. *McArthur v. Scott*, 113 *U. S.* 240 (28 L. ed. 1032).

Where suit is brought by or against a few as representing a numerous class that fact must be alleged of record so the court may determine whether sufficient parties are before it to properly represent the rights of all. *Ib.*

A trustee having large powers and important duties with respect to an estate is a necessary party to a suit by a stranger to defeat the trust. *Ib.*

In every case there must be such parties before the court as to insure a fair trial of the issue in behalf of all. *Ib.*

A trustee of real estate may sufficiently represent the beneficiaries. *Ib.*

Where the interested parties are numerous and the suit is for an object common to them all, one or more may sue on behalf of themselves and of the others. *Smith v. Swormstean*, 16 *How.* 288-302, 14 L. ed. 942.

A bill may also be maintained against a portion of a numerous body of defendants representing a common interest. *Ib.* 302.

Where one of a class sues for all, there must be a common interest in the subject of the suit, a community of interest growing out of the nature and condition of the right in dispute; a common title out of

which the question arises and which lies at the foundation of the suit. *Scott v. Donald*, 165 *U. S.* 107-116, 41 L. ed. 648.

All owners of land similarly situated may become parties to a bill to quiet title. *Prentiss v. Duluth Storage Co.*, 58 *Fed. R.* 441, 7, *C. C. A.* 293.

RULE XXXIX—*Absence of Persons Who Would Be Proper Parties*

In all cases where it shall appear to the court that persons, who might otherwise be deemed proper parties to the suit, cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may, in its discretion, proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties.

Substantially the same as Rule 47 of the Rules adopted March 2, 1842.

Decisions

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, that neither former Rule 47 nor the Act of Congress of Feb. 28, 1839 (5 *Stat.* 321), sec. 737, *Rev. Stats. (U. S. Comp. Stats. 1901, p. 587)*, enabled the Circuit Court to make a decree in equity in the absence of an indispensable party, that is, a party whose rights must necessarily be affected by such decree. *Shields v. Barrow*, 17 *How.* 130-141, 15 L. ed. 158.

Neither can it make any decree between the parties before it that so far involves the rights of an absent person that complete justice cannot be done between the parties in the suit without affecting those rights. *Ib.* 141.

Sec. 737, *Rev. Stats. (U. S. Comp. Stats. 1901, p. 587)*, relates solely to the non-joinder of persons who are not within the reach of the process of the court. It does not affect any case where persons having an interest are not joined because their citizenship is such that their joinder would defeat the jurisdiction. *Ib.* 140

Naming a party in the bill and praying process against him when he is out of the jurisdiction does not enable the court to make a decree in the absence of a necessary party. *Cross v. DeValle*, 6 *Fed. Cases*, 891, 21 *Law Rep.* 734.

Parties in suits in equity are divisible into three classes. (1) Formal parties who have no interest in the controversy, though indirectly they may have in the subject-matter. (2) Necessary parties, who having an interest in the controversy, but so separable from those parties before the court that a decree may be entered without injuriously affecting their interests. (3) Indispensable parties who have such an interest in the controversy that a final decree cannot be made without either affecting that interest or making an inequitable decree. *Minnesota v. Northern Securities Co.*, 184 *U. S.* 199-236, 46 *L. ed.* 499.

Parties to bills are either (1) nominal, (2) necessary, or (3) indispensable. If a necessary party is out of the jurisdiction it should be made to appear upon the pleadings. *Tobin v. Walkinshaw*, 1 *McAll.* 26; *Fed. Cases*, 14,068.

Indispensable parties have such an interest in the subject-matter of the controversy that a final decree between the parties before the court cannot be made without affecting their interests or leaving the controversy in such a situation that its final determination may be inconsistent with equity. *Donovan v. Campion*, 85 *Fed. R.* 71, 29 *C. C. A.* 30.

A proper party as distinguished from a necessary party is one who has an interest in the subject-matter of the litigation which may be conveniently settled therein. *Kelley v. Boettcher*, 85 *Fed. R.* 55, 29 *C. C. A.* 14.

If the rights of those not before the court are inseparably connected with the claim of the parties litigant, so that a final decision cannot be made without affecting the rights of the absent parties, the peculiar constitution of the Circuit (District) Court forms no ground for dispensing with such parties. *California v. So. Pacific Co.*, 157 *U. S.* 229-249, 39 *L. ed.* 690, Oct. T., 1894.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, where it was urged that because certain defendants were non-residents and it was impossible and therefore unnecessary to join them, notwithstanding sec. 737, *Rev. Stats.* (*U. S. Comp. Stats.* 1901, p. 587), and former Rule 47, a Circuit Court could make no decree in a suit in the absence of a party whose rights must necessarily be affected thereby. *Gregory v. Stetson*, 133 *U. S.* 579-587, 33 *L. ed.* 974, Oct. T., 1889.

Where the real merits of a cause may be determined without essentially affecting the interests of absent persons perhaps it may be the duty of a court to decree as between the parties before it. The law as to jurisdiction of Federal courts justifies the dispensing with parties merely formal. *Russell v. Clark's Extxs.*, 7 *Cr.* 98, 3 *L. ed.* 281.

The rule that all parties in interest be brought before the court addresses itself to the policy of the court and does not affect its jurisdiction. It is subject to the court's discretion and susceptible of modification for promotion of justice. *Elmerdorf v. Taylor*, 10 *Wh.* 152-167, 6 L. ed. 294.

It is not an inflexible rule the failure to observe which turns the party out of court. *Mallow v. Hinde*, 12 *Wh.* 193-197, 6 L. ed. 600.

Where parties having a vested interest (legal or equitable) in the property in litigation are omitted, the bill should state they are unwilling to become parties or cannot be made defendants by the service of process. *Harding v. Handy*, 11 *Wh.* 133, 6 L. ed. 429.

Interest means interest in the subject-matter (object) of the suit. *Gregory v. Stetson*, 133 *U. S.* 579-587, 33 L. ed. 794.

A court cannot adjudicate directly on a party's rights, unless he is a party to the suit. *Ib.*

A bill will not be dismissed for want of proper parties if necessary parties can be supplied. *Held*, new parties could not be brought into a cause by cross-bill. *Fourth N. Bk. of, etc., v. N. O. & C. Ry. Co.*, 11 *Wall.* 624, 20 L. ed. 84.

Where a person is so related to the subject-matter of the suit that the rights of such person must be passed upon by the court to reach a final decree, such person is a necessary party. *Consolidated Water Co. v. Babcock*, 76 *Fed. R.* 243-248.

The general rule is that all persons interested in the controversy should be made parties in order that there may be an end of litigation. *Williams v. Bankhead*, 19 *Wall.* 563-571.

Where a person would be directly affected by a decree he is an indispensable party (unless the parties are too numerous when the case is subject to a special rule).

When a person is interested in the controversy but will not be directly affected by a decree made in his absence, he is a proper but not an indispensable party. *Ib.*

Where a person is not interested in the controversy between the immediate litigants but has an interest in the subject-matter he may be made a party or not at the option of the complainant. *Ib.* 571.

If the court is able to proceed to a decree and do justice to the parties before it without injury to absent parties equally interested in the litigation but who cannot conveniently be made parties, this may be done. *Payne v. Hook*, 7 *Wall.* 425-431, 19 L. ed. 260.

Where it is for the convenience of the administration of justice or where to require their joinder would defeat the jurisdiction of the court, the court will dispense with parties when it may proceed to a decree without them, especially where the parties are very numerous and unknown. *Mandeville v. Riggs*, 2 *Pet.* 482-488, 7 L. ed. 493.

The court will always dispense with merely formal parties who are beyond the reach of process. *Abbott v. Am. H. R. Co.*, 4 *Blatchf.* 489; *Fed. Cases*, 9.

Where a necessary party cannot be subjected to its jurisdiction, the court will refuse to entertain the suit. *Barney v. Baltimore*, 6 *Wall.* 280-284, followed in *Bank v. Smith*, 6 *Fed. R.* 215, and *Dormitzer v. Ill., etc., Co.*, *Ib.* 217.

Under former Rule 47, *Held*, a complainant need not join any but indispensable parties. If he does join them when their joinder will oust the jurisdiction of the court he may be permitted to dismiss them and thereupon the court has the same jurisdiction of the case it would have had if they had never been made parties. *Sioux City, etc., Co. v. Trust Co.*, 82 *Fed. R.* 124-128, 27 *C. C. A.* 123.

The subsequent introduction into the suit of such parties on their own petition will not affect the jurisdiction of the court. *Ib.* 128.

All those whose presence is required for a determination of the entire controversy must be made parties and all those who have an interest in the subject-matter of the litigation may be made parties although they have no interest in the litigation between the immediate parties. *Ib.* 128.

Where jurisdiction vests at the commencement of a suit over the indispensable parties to a decree but the exercise of jurisdiction is prevented by the presence of other proper and material parties, the names of such other parties may be stricken out and the objection to the exercise of jurisdiction thereby avoided. *Tug River, etc., Co. v. Brigel*, 86 *Fed. R.* 818-821, 30 *C. C. A.* 415.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, the want of proper parties was not a fatal defect under former Rule 47, if the parties were out of the jurisdiction of the court; *Held*, further, a plea setting up a want of parties should show that the parties alleged to be necessary are alive and within the jurisdiction of the court. *Goodyear v. Toby*, 6 *Blatchf.* 130; *Fed. Cases*, 5,585.

Proper or necessary parties to a suit may be dispensed with when beyond the jurisdiction of the court, if the rights of complainant and respondents before the court can be determined without them and they

are not indispensable; although if within the jurisdiction of the court they might be regarded as necessary parties. *Union Mill & M. Co. v. Dangberg*, 81 *Fed. R.* 73-89.

If a case in equity can be completely decided as between the litigant parties, the fact that there are other persons without the jurisdiction who might have been made parties, if they could have been reached by process, should not prevent a decree as to all parties within the jurisdiction of the court. *Ib.* 90.

Where their retention as complainants would oust the jurisdiction of the court, parties who have a similarity but no community of interest with the complainant may be stricken out as plaintiffs and made defendants; so long as they are on the record the rule that all parties in interest must be either plaintiffs or defendants is complied with, and it makes no difference on what side of the record they are. *Ins. Co. v. Svendsen*, 74 *Fed. R.* 346-349.

Where no relief can be given without the taking of an account between an absent party and one before the court, though the defect of parties may not defeat the jurisdiction, yet the court will make no decree in favor of complainant. *Hagan v. Walker*, 14 *How.* 29-36, 14 L. ed. 312.

Where no decree is sought against absent parties, and a decree in favor of the complainants will not affect any rights which they may have, it will not be ground for objection that they were not made parties, though if they had been within the jurisdiction they would have been made parties. *Union Bank v. Stafford*, 12 *How.* 327, 341.

The Act of Congress of Feb. 28, 1839 (*Rev. Stats.*, sec. 737, *U. S. Comp. Stats.* 1901, p. 587), authorizes the court to render a decree against the actual defendants who have a beneficial interest and are in court. *Ib.*

The Act of Feb. 28, 1839 (*Rev. Stats.* sec. 737, *U. S. Comp. Stats.* 1901, p. 587), has effected no change in the jurisdiction of the Circuit Court as regards the character of the parties. It was only intended to remove the difficulties arising from the necessity to join several defendants, some of whom were, and others were not, inhabitants of the district in which the suit was brought. *Commercial, etc., Bank v. Slocum*, 14 *Pet.* 60-68, 10 L. ed. 354.

In a suit to enforce a lien on lands situated within the district where suit was brought, one defendant, served with process in the State where suit was pending, was a resident of another State; *Held*, that under the Act of Feb. 28, 1839 (*Rev. Stats.*, sec. 737, *U. S. Comp. Stats.* 1901, p. 587), such service brought him within the jurisdiction of the court. *Winter v. Ludlow*, 16 *Leg. Int.* 332; *Fed. Cases*, 17,891; *Ober v. Gallagher*, 93 *U. S.* 199, Oct. T., 1876, 23 L. ed. 829.

NOTE. For the practice under the Act of Mar. 3, 1887, see *McCormick Co. v. Walthers*, 134 *U. S.* 41-43, 33 L. ed. 833; also *Greeley v. Low*, 155 *U. S.* 58, 39 L. ed. 69.

A bill will not be dismissed for want of proper parties alone; but if a decree cannot be made without prejudice to one not a party, upon whom process cannot be served, the bill must be dismissed. *Bank v. Carrolton Rd.*, 11 *Wall.* 624-631.

The want of proper parties may be cured by amendment. *Ib.*

A bill ought not to be dismissed for want of proper parties unless the complainant refuses to make parties those who are really necessary, and then it may be dismissed without prejudice. *Dandridge v. Washington's Executors*, 2 *Pet.* 370-378, 7 L. ed. 454.

The joinder of immaterial parties will not oust the jurisdiction of the court as between those parties who are properly before it. *Carneal v. Banks*, 10 *Wheat.* 181-188, 6 L. ed. 297.

Where it properly appears that there is a party on the record over whom the court has no jurisdiction and who is not a necessary party to the suit, the bill will be dismissed as to him and retained as to the others. *Post v. Reed*, 1 *Woods*, 647; *Fed. Cases*, 17,011.

In chancery there is a distinction as to proceeding in the absence of parties, between their being *active* and *passive*; they are active when no decree can be made without their being in court; and in such case the court cannot proceed without them, though not amenable to the process of the court. Where the court can give complete relief to those who seek it without affecting the interests of passive parties it will proceed to do so where they are not amenable to the process of the court. *Joy v. Wirtz*, 1 *Wash. C. C.* 517; *Fed. Cases*, 7,554.

Held, prior to the Act of Feb. 28, 1839 (sec. 737, *Rev. Stats.* sec. 50, *Judicial Code*), if a joint interest was vested in the defendants with absent parties the court had no jurisdiction. If the interest was separable the jurisdiction attached. *Tobin v. Walkinshaw*, 1 *McAll.* 26; *Fed. Cases*, 14,068.

Where the interests of parties before the court and those who cannot be reached by process and do not voluntarily appear, are inseparable, the obstacle is insuperable and the bill will be dismissed. *Ribbon v. Railroad Co.*, 16 *Wall.* 446, 450, 21 L. ed. 67.

A lunatic as well as an infant must be made parties where their interests are sought to be affected by the decree, and process must be

prayed against them. *Harrison v. Rowan*, 4 *Wash. C. C.* 202; *Fed. Cases*, 6,143.

Where the jurisdiction of the court is complete between the parties before it, the objection for want of parties is not to the jurisdiction, but to the relief sought against the present defendants without joining absent parties. Where this objection is made and sustained the court will order all proper parties to be made. *Ib.*

A lunatic answers by his committee under an order of the court appointing him for that purpose. If he has no committee the court appoints some person as guardian to defend the suit and answer for the lunatic. *Ib.*

The sureties of an administrator are properly joined as defendants in a suit charging fraud in the administration of the estate, where if a balance be found the sureties would be liable. *Payne v. Hook*, 7 *Wall.* 425-432, 19 *L. ed.* 260.

RULE XL—*Nominal Parties*

Where no account, payment, conveyance, or other direct relief is sought against a party to a suit, not being an infant, the party, upon service of the subpœna upon him, need not appear and answer the bill, unless the plaintiff specially requires him to do so by the prayer; but he may appear and answer at his option; and if he does not appear and answer he shall be bound by all the proceedings in the cause. If the plaintiff shall require him to appear and answer he shall be entitled to the costs of all the proceedings against him, unless the court shall otherwise direct.

Same as Rule 54 of the Rules adopted March 2, 1842.

Decisions

Where nothing is asked of a defendant by the bill and his rights are not put in issue and nothing can be required of him by decree, although he is clearly interested in the subject-matter of the suit, he is not a necessary party. *Society, etc., v. Town, etc.*, 2 *Paine*, 536; *Fed. Cases*, 13,155.

RULE XLI—*Suit to Execute Trusts of Will—Heir as Party*

In suits to execute the trusts of a will, it shall not be necessary to make the heir at law a party; but the plaintiff shall be at liberty to make the heir at law a party where he desires to have the will established against him.

Same as Rule 50 of the Rules adopted March 2, 1842.

Decisions

A devisee of land in another State, who is a non-resident, need not be joined in a suit against an executor for an account and payment of legacies. *West v. Smith*, 8 *How.* 402-410.

In suits respecting trust property brought either by or against the trustees, the *cestuis que trust* as well as trustees are necessary parties. Where suit is brought by a trustee to recover trust property, which in no wise affects his relation with his *cestuis que trust*, it is not necessary to make the latter parties. *Carey v. Brown*, 92 *U. S.* 171-172.

Where the fee is vested in an executor or trustee this rule applies, not otherwise. *Chew v. Hyman*, 7 *Fed. R.* 7-14.

Where a devise by will does not vest the fee in an executor, the devisee is a necessary party to suits concerning land devised. *Ib.* 14-15.

RULE XLII—*Joint and Several Demands*

In all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the court as parties to a suit concerning such demand all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable.

Same as Rule 51 of the Rules adopted March 2, 1842.

RULE XLIII—*Defect of Parties—Resisting Objection*

Where the defendant shall by his answer suggest that the bill of complaint is defective for want of parties, the plaintiff may, within fourteen days after answer filed, set down the cause for argument as a motion upon that objection only; and where the plaintiff shall not so set down his cause, but shall proceed therewith to a hearing, notwithstanding an objection for want of parties taken by the answer, he shall not at the hearing of the cause, if the defendant's objection shall then be allowed, be entitled as of course to an order to amend his bill by adding parties; but the court shall be at liberty to dismiss the bill, or to allow an amendment on such terms as justice may require.

An amendment of Rule 52 of the Rules adopted March 2, 1842.

Decisions

The names or descriptions of the parties who should be brought before the court should be specified. *Segee v. Thomas*, 3 *Blatchf.* 11; *Fed. Cases*, 12,633.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, a plea for want of parties was not matter for abatement; it was a plea in bar and went to the whole bill; former Rule 47 enabled the court to dispense with nominal and necessary parties, but not with indispensable parties. *Tobin v. Walksinshaw*, 1 *McAll.* 26; *Fed. Cases*, 14,068.

The defect, if vital, may be insisted on at the hearing, and may be assigned for error on appeal. *Ib.*

Upon objection for want of parties, the court will give leave to amend, or will order proper parties be made. *Harrison v. Rowan*, 4 *Wash. C. C.* 202; *Fed. Cases*, 6,143.

Upon failure to make proper parties within a reasonable time the bill will be dismissed. *Ib.*

Upon objection such defect of parties may be cured by amendment. *Douglass v. Butler*, 6 *Fed. R.* 228-229.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, a case might be set down upon defendant's objection made by answer setting up want of proper parties, even after replication filed, if defendant failed to object. *Lorillard v. Standard Oil Co.*, 2 *Fed. R.* 902-903.

Where a bill is dismissed because of the absence of a non-resident indispensable party, it should be without prejudice. *Kendig v. Dean*, 97 *U. S.* 423-426.

RULE XLIV—*Defect of Parties—Tardy Objection*

If a defendant shall, at the hearing of a cause, object that a suit is defective for want of parties, not having by motion or answer taken the objection and therein specified by name or description the parties to whom the objection applies, the court shall be at liberty to make a decree saving the rights of the absent parties.

Substantially the same as Rule 53 of the Rules adopted March 2, 1842.

Decisions

The want of parties is not necessarily fatal even at the hearing, because the cause may be ordered to stand over to make further parties,

but this is rarely done unless where the cause as to the new parties may stand upon bill and answer to such parties; but rather the cause will be dismissed without prejudice. *West v. Randall*, 2 *Mason*, 181; *Fed. Cases*, 17,424.

Where the objection to the want of proper parties is duly made, it is not sufficient ground for dismissing the bill, but the suit should stand over that new parties may be made. *Milligan v. Millage*, 3 *Cranch*, 220, 2 L. ed. 417.

The objection that some of the plaintiffs have no interest in the suit cannot be first made at the hearing. *Segee v. Thomas*, 3 *Blatchf.* 11; *Fed. Cases*, 12,633.

Courts of equity are always unwilling to turn a complainant out of court on objection for want of proper parties made at the final hearing. *Townsend, etc., Bank, etc., v. Epping*, 3 *Woods*, 390; *Fed. Cases*, 14,120.

RULE XLV—*Death of Party—Revivor*

In the event of the death of either party the court may, in a proper case, upon motion, order the suit to be revived by the substitution of the proper parties. If the successors or representatives of the deceased party fail to make such application within a reasonable time, then any other party may, on motion, apply for such relief, and the court, upon any such motion may make the necessary orders for notice to the parties to be substituted and for the filing of such pleadings or amendments as may be necessary.

A substitute for Rule 56 of the Rules adopted March 2, 1842.

Statutory Provisions

Rev. Stats., sec. 955, *U. S. Comp. Stats.* 1901, p. 697. When either of the parties, whether plaintiff, petitioner, or defendant, dies before final judgment, the executor or administrator may, if the suit survives, prosecute or defend to final judgment. The defendant shall answer and the cause will be heard and determined, and judgment rendered for or against the executor or administrator. If the executor or administrator neglects or refuses to become a party twenty days after being served with a *scire facias*, the court may nevertheless render judgment against the deceased party. The executor or administrator on becoming a party is entitled to a continuance until the next term.

Rev. Stats., sec. 956, *U. S. Comp. Stats.* 1901, p. 697. When one of several plaintiffs or defendants dies, in an action which survives to or

against the other, the writ or action shall not abate; but, upon suggestion on the record, the action shall proceed in favor of or against the surviving party.

Decisions

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, former Rule 56 was declarative of the practice in equity, and the provisions of the Judiciary Act of 1789, Ch. 20 (*Rev. Stats.* 955, *U. S. Comp. Stats.* 1901, p. 697). *FitzPatrick v. Domingo*, 14 *Fed. R.* 216-217.

If the original parties were citizens of different States the suit may be revived where the new parties are citizens of the same State. *Clarke v. Matthewson*, 12 *Pet.* 164-172, 9 L. ed. 1041. Reversing the same case reported in 2 *Sum.* 262; *Fed. Cases*, 2,857.

In equity the death of a party amounts to a mere suspension of the suit; where the cause of action survives it does not amount to the determination of the suit. *Ib.* 171.

A bill of revivor is not the commencement of a new suit, but the mere continuation of the old one. *Ib.* 172.

The revivor of a suit in equity by or against the representative of the deceased party is a matter of right. *Ib.* 172.

The representatives take the place of those whom they represent, and the suit proceeds in its new form unaffected by its change of name. *Vattier v. Hind*, 7 *Pet.* 252-266, 8 L. ed. 675.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, on a bill of revivor the settled practice was to use all the testimony which might have been used had no abatement occurred. *Ib.*

In equity an abatement is merely an interruption to the suit, suspending its progress until the new parties are brought before the court, and if this is not done within a proper time the court will dismiss the suit. *Hoxie v. Carr*, 1 *Sum.* 173; *Fed. Cases*, 6,802.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, new defenses could not be made in an answer to a bill of revivor. Such bill put in issue nothing but the character of the new parties brought in. *Fretz v. Stover*, 22 *Wall.* 198-204, 22 L. ed. 769.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, on a bill of revivor the sole questions before the court were the competency of the parties, and the correctness of the frame of the bill to revive. *Bettes v. Dana*, 2 *Sum.* 383; *Fed. Cases*, 1,368.

Held, objections to the original bill for want of equity must be reserved until after the revival. *Ib.*

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, after answer and discovery, a suit brought merely for discovery could not be revived. Such bill ought to be dismissed, but if it became a bill for relief it might be revived. *Horsburg v. Baker*, 1 *Pet.* 232-236, 7 L. ed. 125.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, where a corporation was dissolved by the State court pending suit in the Federal court, that court had the power to grant a bill of revivor. *Griswold v. Hilton*, 87 *Fed. R.* 256, 30 *C. C. A.* 632.

There are exceptional cases in which the defendant himself or his representatives may revive a suit by supplemental bill or original bill in the nature of a supplemental bill. *Chester v. Life Ass'n of America*, 4 *Fed. R.* 487-490.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, where the only interest of the representative of a deceased defendant was to dissolve an injunction he should not proceed by bill to revive, but by a motion for a rule that the injunction be dissolved unless complainant within a short time file his bill of revivor. *Ib.*

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, the words "May be revived" in former Equity Rule 56 should be read "must be" or "shall be revived." The Federal courts then had no authority to allow a revivor on motion. *Held*: As the defendant might desire to contest the right or title of the proposed new plaintiff, and many complex questions of law or fact, or both, might be raised, a suit in equity must be revived by a bill of revivor, or a bill in the nature of a bill of revivor. *Dillard's Admr. v. Central Virginia Coal Co.*, 125 *Fed. R.* 157-159.

Some doubt is intimated as to whether sec. 955, *Rev. Stats. (U. S. Comp. Stats. 1901, p. 697)*, is applicable to a chancery suit. *Ib.* 159.

Sec. 955, *Rev. Stats. (U. S. Comp. Stats. 1901, p. 697)*, held not applicable to a chancery suit. *Brown v. Fletcher*, 140 *Fed. R.* 639-642.

Supreme Court Rule 15 prescribes the mode by which the defendant may compel the appearance by the representative of a deceased complainant in that court, but there was no such rule prescribed for the Circuit Court in equity by the former rules. *Ib.* 645.

The personal representative of a deceased complainant will not be permitted to suffer a suit in equity to lie dormant without seeking to revive for a period equal to that prescribed in the Statute of Limitations to bar a right. *Ib.* 645.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, former Equity Rules 56 and 57 made no provision to compel the revival of a suit abated by the death of a sole complainant;

they prescribed simply the method of procedure by which a personal representative at his own instance might be substituted for the deceased complainant. *Ib.*

By the practice of the High Court of Chancery of England in 1842, which then regulated the equity practice in the Federal courts in the absence of any rule, where a sole plaintiff died before decree, the suit could not be revived at the instance of a defendant or his legal representative; in such case, therefore, the defendant might have a dismissal of the bill for want of prosecution where a revivor was not had within a limited time. *Ib.*

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, a defendant could not defeat a revival of a suit which had abated by interposing objections in the nature of a demurrer to the original bill which he had already answered. *Simmons v. Morris*, 109 *Fed. R.* 707-708.

Held whether the Federal courts may consider the question of laches upon a bill to revive was still open, but on principle it seemed that laches sufficient to defeat the maintenance of the original suit, if occurring after it has abated, should prevent its revival. *Ib.* 709.

Considered, but not decided, that inexcusable laches resulting in irreparable injury may be a sufficient reason to defeat the right to revive, but it must have been laches in filing a bill of revivor, or possibly in prosecuting the original suit. *Ib.* 709.

RULE XLVI—*Trial—Testimony Usually Taken in Open Court—Rulings on Objections to Evidence*

In all trials in equity the testimony of witnesses shall be taken orally in open court, except as otherwise provided by statute or these rules. The court shall pass upon the admissibility of all evidence offered as in actions at law. When evidence is offered and excluded, and the party against whom the ruling is made excepts thereto at the time, the court shall take and report so much thereof, or make such a statement respecting it, as will clearly show the character of the evidence, the form in which it was offered, the objection made, the ruling, and the exception. If the appellate court shall be of opinion that the evidence should have been admitted, it shall not reverse the decree unless it be clearly of opinion that material prejudice will result from an affirmance, in which event it shall direct such further steps as justice may require.

A new Rule promulgated November 4, 1912.

Statutory Provisions

Rev. Stats., sec. 858, *U. S. Comp. Stats.* 1901, p. 659. In the courts of the United States, in civil actions, no witness is excluded because of interest in the issue, except that in actions by or against executors, administrators, or guardians neither party may testify as to transactions with or statements by the testator, intestate, or ward, unless called by the opposite party, or required by the court. In other respects the laws of the State where the court is held govern as to competency.

Rev. Stats., sec. 862, *U. S. Comp. Stats.* 1901, p. 661. The mode of proof in equity and admiralty is as the Supreme Court may prescribe. Amended by the Act of Mar. 9, 1892 (27 *Stat. L.* 7), to allow the taking of depositions and testimony in the mode prescribed by the laws of the State in which the suit is pending, in addition to existing modes.

Rev. Stats., sec. 868, *U. S. Comp. Stats.* 1901, p. 664. Where a court of the United States issues a commission to take testimony the clerk of the Federal court in the district where the testimony is taken may issue subpoenas for witnesses and the judge of such court enforce obedience to such process.

Rev. Stats., sec. 869, *U. S. Comp. Stats.* 1901, p. 665. The clerk of such court may issue subpoena *duces tecum*, and the judge enforce obedience to such subpoena.

Rev. Stats., sec. 870, *U. S. Comp. Stats.* 1901, p. 665. Under secs. 868 and 869, witnesses not required to attend at any place out of the county of their residence or more than forty miles therefrom.

Rev. Stats., sec. 876, *U. S. Comp. Stats.* 1901, p. 667. Subpoena for witnesses may run into any other district as well as the district where the court is held, provided the witness does not live more than 100 miles from the place court is held.

Sec. 12 of the Act of Feb. 4, 1887, 24 *Stat.*, L. 379, gives power to the Interstate Commerce Commissioners to subpoena witnesses from any place in the United States at any designated place of hearing and gives power to any Circuit (District) Court of the United States within the jurisdiction where an inquiry is being had to issue an order to appear and punish for contempt upon failure to obey.

Rev. Stats., sec. 847, *U. S. Comp. Stats.* 1901, p. 652. Fees of United States commissioners. Fees: Administering an oath, ten cents; issuing subpoena, twenty-five cents; taking and certifying depositions, twenty cents per folio of 100 words.

Rev. Stats., sec. 848, *U. S. Comp. Stats.* 1901, p. 654. Fees of witnesses. Witness fees: Per diem, \$1.50 and five cents per mile each way.

Rev. Stats., sec. 917, *U. S. Comp. Stats.* 1901, p. 684. The Supreme Court may prescribe the modes of taking and obtaining evidence in suits in equity and admiralty.

Rev. Stats., sec. 863, *U. S. Comp. Stats.* 1901, p. 661. Officers who may take depositions. A judge of any United States court, any commissioner of a Circuit (District) Court, clerk of a District or Circuit Court, any

chancellor, justice, or judge of a Supreme or Superior Court, mayor or chief magistrate of city, judge of a county court or court of common pleas or any notary public. The officer must not be a relative or attorney of either party or otherwise interested in the event of the suit.

NOTICE. Reasonable notice in writing must be given the opposite party or his attorney, as either may be nearest, and, when notice served personally is impracticable, upon such notice as any judge authorized to hold courts in the circuit or district directs.

Rev. Stats., sec. 864, U. S. Comp. Stats. 1901, p. 662. Manner of taking depositions. Formerly required to be reduced to writing by the magistrate, or by the witness in the magistrate's presence and by no other person. Now amended to allow the testimony to be reduced to writing or typewriting by the officer taking the deposition or some person under his personal supervision or by deponent in the officer's presence and afterwards subscribed: as amended by Act May 23, 1900, ch. 541 (31 Stat. L. 182).

Rev. Stats., sec. 865, U. S. Comp. Stats. 1901, p. 663. Sealed and transmitted. The deposition must be sealed up and directed to the court where suit is pending and remain under seal until opened in court, or delivered by the officer into such court with his own hand. When taken *de bene esse* the certificate must state the reasons for taking prescribed by sec. 863 and the notice given.

Decisions

Facts well pleaded in a bill and not denied or controverted by the answer are not required to be proved, unless the defendant by the answer demands proof. *Klenk v. Byrne*, 143 *Fed. R.* 1008-1010.

General denials in an answer which are inconsistent with facts therein affirmatively alleged are not entitled to consideration. *Ib.*

No decree can be rendered upon the proofs upon matter not charged in the bill, any more than upon a case alleged but not proved. *Baldwin v. Liverpool & L. & G. Ins. Co.*, 124 *Fed. R.* 206-208, 59 *C. C. A.* 660.

Prior to the amendment of former Rule 67 in 1861 the only method of taking the testimony of a witness within the jurisdiction was either by an examination in open court, or upon a commission with written interrogatories annexed. *Bronson v. La Cross M. R. Co.*, 9 *Am. Law Reg.* 350; *Fed. Cases*, 1,930.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, Paragraph 9 of Rule 67 was declared to be a construc-

tion given by the Supreme Court of the Act of Mar. 9, 1892 (ch. 14, 27 Stat. L. 7) and by this rule the application of the statute was limited to final hearings. *Fenno v. Primrose*, 125 Fed. R. 635-636.

Affidavits not taken before any officer authorized by any Act of Congress to perform this duty should be disregarded. *Haight v. Morris Aqueduct*, 4 Wash. C. C. 601; *Fed. Cases*, 5,902.

RULE XLVII—*Depositions—To Be Taken in Exceptional Instances*

The court, upon application of either party, when allowed by statute, or for good and exceptional cause for departing from the general rule, to be shown by affidavit, may permit the deposition of named witnesses, to be used before the court or upon a reference to a master, to be taken before an examiner or other named officer, upon the notice and terms specified in the order. All depositions taken under a statute, or under any such order of the court, shall be taken and filed as follows, unless otherwise ordered by the court or judge for good cause shown: Those of the plaintiff within sixty days from the time the cause is at issue; those of the defendant within thirty days from the expiration of the time for the filing of plaintiff's depositions; and rebutting depositions by either party within twenty days after the time for taking original depositions expires.

A new Rule promulgated November 4, 1912.

Decisions

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, under former Rule 67 courts were authorized to appoint examiners to take testimony orally beyond the limits of their own districts. *White v. Toledo, St. L. & K. C. R. Co.*, 79 Fed. R. 133-135; 24 C. C. A. 467; *Western, etc., R. Co. v. Drew*, 3 Woods, 691; *Fed. Cases*, 17,434.

The attendance of witnesses before such commissioner may be compelled by the court of the district in which the examination is held. *Ib.* 134.

Witnesses subpoenaed to appear and testify before a master appointed to take testimony in another district, who refuse to appear, or who appear and refuse to be sworn and testify, may be punished for contempt. *In re Spofford*, 62 Fed. R. 443-444, 10 C. C. A. 493.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, under Clause 1 of former Rule 67, that the appointment of commissioners to take testimony abroad was not grantable as of course, but required allowance by the judge, on previous notice to the adverse party. *United States v. Parrott*, 1 *McAll.* 447; *Fed. Cases*, 15,999.

The practice of permitting a master in his discretion to take testimony outside of the district of his appointment, has become of almost universal application. *Consolidated Fastner Co. v. Columbia, etc., Co.*, 85 *Fed. R.* 54.

A master may take testimony in a foreign country. *Bate Refrigerating Co. v. Gillette*, 28 *Fed. R.* 673-675.

Held, the taking of testimony orally before an examiner in the presence of the parties is much more satisfactory than taking it by a commission. *Ib.* 676.

The master is a judicial officer, a representative of the court, and it is not the general practice to interfere with his acts *in limine*, but to wait until his report comes in before hearing exception, on the ground of irregularity or excess of authority. *Ib.* 674.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, the mode of taking testimony by deposition under former Rule 67 was by oral questions put at the time if desired, and not necessarily by written interrogatories given to the officer before commencing the taking. *Bischoffheim v. Baltzer*, 10 *Fed. R.* 1-3.

Under former Rule 67, Clause 2, if either party gave the other notice that he desired the evidence to be taken orally all the evidence was to be so taken in the presence of parties and counsel, and the witnesses might be cross-examined and re-examined in the manner used in common-law courts; but the notice so given was subject to the power of the chancellor for special reasons to annul its usual effect. *Ib.* 3.

Where testimony in a foreign country can be taken orally it ought not to be taken otherwise except for special reasons. *Ib.* 4.

Where complainant, who resided abroad, applied for an order for a commission to examine himself on written interrogatories the court allowed defendant to cross-examine him orally. *Ib.*

Where the notice read that the deposition taken under sec. 863, *Rev. Stats. (U. S. Comp. Stats. 1901, p. 662)*, would be taken before "W. G. P., notary, or some other officer authorized by law to take depositions" and it was taken before "N. F. E." a notary, *Held*, regular and the notice in conformity to the statute. *Gormley v. Bunyan*, 138 *U. S.* 623, 34 *L. ed.* 1090.

The mere clerical error of the clerk in wrongly spelling the name of the Commissioner is not material. *Bibb v. Allen*, 149 *U. S.* 481-488, 37 L. ed. 823.

A motion to suppress for irregularities should be promptly made, so as to afford opportunity to re-take or correct the deposition. It is too late when made after the case is called for trial (a case at law). *Ib.*

If not satisfied with the first deposition a party may have another. *Nash v. Williams*, 20 *Wall.* 226, 22 L. ed. 251.

Deposition and return set out. *Spaids v. Cooley*, 113 *U. S.* 278, 28 L. ed. 985.

A lost deposition may be proved by a copy. The party taking is not bound to supply it with another and different deposition. *Burton v. Driggs*, 20 *Wall.* 125, 22 L. ed. 299.

Objections which go to defects or irregularities in the taking of the deposition which might have been obviated by retaking, if not noted when the deposition is taken or presented before trial by motion to suppress are waived. The party taking a deposition is entitled to have the question of its admissibility settled in advance of trial. *Doane v. Glenn*, 21 *Wall.* 33, 22 L. ed. 476.

Objection to copies of papers, etc., embodied in or annexed to a deposition should be by motion to suppress made before trial, so as to afford opportunity to produce the originals if competent. *Ins. Co. v. Guardiola*, 129 *U. S.* 642, 32 L. ed. 802.

Where motion to suppress is made before trial, if objection is not made and exception taken when the deposition is offered at the trial the objection is deemed waived. *Nor. Pac. R. v. Wrein*, 158 *U. S.* 274, 39 L. ed. 977.

Held, testimony taken before an examiner was a deposition. *Missouri v. Illinois*, 202 *U. S.* 598-600, 50 L. ed. 1160.

The effect of Act Mar. 2, 1892, is not to enlarge the grounds for taking depositions, but in respect to depositions authorized to be taken by Federal law the courts may follow either the State or Federal practice in the manner of taking them. *Hanks Dental Assn. v. International, etc., Co.*, 194 *U. S.* 303-309, 48 L. ed. 98.

The act does not enlarge the instances in which depositions may be taken. *Nat'l Cash Register v. Leland*, 77 *Fed. R.* 242, 37 *C. C. A.* 372, approved 94 *Fed. R.* 502.

The complainant may have an order that the deposition of defendant may be taken. *Texas v. Chiles*, 21 *Wall.* 488, 22 L. ed. 650.

Formerly the deposition of a party to the cause could not be read. *Hoyt v. Hammerkin*, 14 *How.* 350, 14 L. ed. 451. Changed by sec. 858, *Rev. Stats., U. S. Comp. Stats.* 1901, p. 659.

The form of the oath administered to the witnesses need not be set out in the return. The commissioners are to examine the witnesses produced by the party suing out the commission left with them before the commission is closed. It is immaterial in whose handwriting the deposition is. That a commission is sued out by plaintiff does not preclude defendant from joining with consent of plaintiff and a joint commission may issue (no interrogatories need be annexed to the commission when sued out). *Keene v. Meade*, 3 *Pet.* 1-9, 7 L. ed. 584.

Under the former rules where application for a commission was made leave would not be granted to the opposite party to orally cross-examine in absence of notice. *Coates v. Merrick Thread Co.*, 41 *Fed. R.* 73.

The authority of commissioners is special and must be executed strictly according to the tenor of the commission. *Armstrong v. Brown*, 1 *Wash. C. C.* 43; *Fed. Cases*, 542.

A commissioner acts under a special authority. If directed to take testimony in one county, he cannot execute the commission by taking it in another. He should state when and where the deposition was taken. *Boudineau v. Montgomery*, 4 *Wash. C. C.* 186; *Fed. Cases*, 1,694.

Decided in 1827, that where the rule designates the place where the depositions are to be taken, the commission must conform to it, and the depositions must be taken at the place indicated or they cannot be read; also that it should appear by the certificate of the persons taking the depositions, that they were taken at the time and place named therein, and in the notice given to the adverse party. *Rhodes v. Celim*, 4 *Wash. C. C.* 715; *Fed. Cases*, 11,740.

Depositions taken under a rule of court, to be read in case of inability of a witness to attend, cannot be read without showing such inability, or that the witness lives beyond the reach of a subpoena. *Reed v. Bertrand*, 4 *Wash. C. C.* 558; *Fed. Cases*, 11,603.

Objections to the competency of a witness must be made at time of taking his deposition. *Mays v. Britton*, 15 *Wall.* 151, 21 L. ed. 126.

Under the old practice, after publication (or before) either party might object to the competency or credibility of the witnesses whose depositions have been put in by the other side. This was done by a petition for liberty to exhibit articles, stating the facts, and objections to the witnesses, and praying leave to examine other witnesses to estab-

lish the truth of the allegations in the articles. Leave was usually granted as of course, but if objection was to the competency, the court would refuse leave after publication, if the incompetency of the witness was known before commission to take his deposition was issued. *Gass v. Stinson*, 2 *Sumn.* 605; *Fed. Cases*, 5,261.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, the court had power under former Rule 69, where the time to take the testimony had expired, to grant relief by allowing the testimony to be taken and filed *nunc pro tunc*. *Coon v. Abbott*, 37 *Fed. R.* 98.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, whether the time prescribed by the rule should be enlarged on application was in the discretion of the Circuit Court, not subject to review by the appellate court under ordinary circumstances. *Ingle v. Jones*, 9 *Wall.* 486-499, 19 L. ed. 621.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, objection that a deposition was taken after a cause was set for hearing and without any order of the court would be overruled if the party so objecting cross-examined witnesses thereunder, such action being deemed a waiver of the irregularity in the issuance of the commission. *Mechanics' Bank v. Seaton*, 1 *Pet.* 299-307, 7 L. ed. 156, Jan. T., 1828.

Objections to the form of the commission and the manner of taking depositions will not avail where upon notice counsel waive a copy of the interrogatories and withhold objections until the trial. Failure to note objections of this kind when the deposition is taken or to present them by motion to suppress or other notice before trial is held a waiver. *Howard v. Stillwell & B. Mfg. Co.*, 139 *U. S.* 199-205, 35 L. ed. 149, Oct. T., 1890.

If the subject-matter is only to be ascertained by evidence, the reference to a master need not particularly empower him to take testimony. *Story v. Livingston*, 13 *Pet.* 359-367, 10 L. ed. 200.

The master may examine witnesses *viva voce*, the parties or counsel being present and not requiring the testimony taken on written interrogatories. *Ib.* 368.

RULE XLVIII—*Testimony of Expert Witnesses in Patent and Trade-Mark Cases*

In a case involving the validity or scope of a patent or trade-mark, the District Court may, upon petition, order that the testimony in chief of expert witnesses, whose testimony

is directed to matters of opinion, be set forth in affidavits and filed as follows: Those of the plaintiff within forty days after the cause is at issue; those of the defendant within twenty days after plaintiff's time has expired; and rebutting affidavits within fifteen days after the expiration of the time for filing original affidavits. Should the opposite party desire the production of any affiant for cross-examination, the court or judge shall, on motion, direct that said cross-examination and any re-examination take place before the court upon the trial, and unless the affiant is produced and submits to cross-examination in compliance with such direction, his affidavit shall not be used as evidence in the cause.

A new Rule promulgated November 4, 1912.

RULE XLIX—*Evidence Taken Before Examiners, etc.*

All evidence offered before an examiner or like officer, together with any objections, shall be saved and returned into the court. Depositions, whether upon oral examination before an examiner or like officer or otherwise, shall be taken upon questions and answers reduced to writing, or in the form of narrative, and the witness shall be subject to cross and re-examination.

A new Rule promulgated November 4, 1912. See former Rule 67, pages 402, 403.

Decisions

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, under former Rule 67 the examiner before whom the witnesses were orally examined was required to note exceptions; but he could not decide their validity. He must take down all the examination in writing and send it to the court with the objections noted. So also when depositions were taken, exceptions to the testimony might be noted by the officer taking the deposition. When the testimony as taken by the examiner or the deposition was filed in court, further exceptions might be there taken. *Blease v. Garlington*, 92 U. S. 1-8, 23 L. ed. 523, Oct. T., 1875.

Where witnesses were examined orally at the hearing, their testimony must be taken down in writing, or its substance. *Ib.*

The early practice and the practice under former Rule 67 as amended stated on pages 4-8.

The Act of 1789 in relation to the oral examination of witnesses in open court was repealed by *Rev. Stats.*, sec. 862 (*U. S. Comp. Stats.* 1901, p. 662). *Ib.*

The Circuit Courts were not required to allow the examination of witnesses orally in open court upon the hearing of equity cases, but might permit it, and if such practice was adopted the testimony must be taken down, or its substance stated in writing and made a part of the record or it would be disregarded on appeal. *Ib.* 9.

Testimony objected to and ruled out must be preserved and sent to the appellate court subject to the objection, or the ruling will not be there considered. A case will not be sent back to have testimony erroneously rejected put on the record. *Ib.* 9.

It is not the practice for the court to pass upon the relevancy and materiality of testimony offered before the examiner during the course of the examination. The witness is to answer the question, and to have such answer preserved, and the relevancy thereof is reserved until final hearing. *Maxim, etc., Co. v. Colts, etc., Co.*, 103 *Fed. R.* 39, 43 *C. C. A.* 100.

Even though the court is of opinion that the testimony being taken before an examiner is irrelevant, a motion to strike it out will be denied, as the appellate court may not agree in such view and hence it should be incorporated in the record. The method of taking testimony in equity characterized as archaic, cumbersome, and unsatisfactory. *Fayerweather v. Ritch*, 89 *Fed. R.* 529.

The necessity of including all the testimony in order that objections offered to its acceptance before the commissioner should be ruled upon, announced in the case of *Blease v. Garlington*, 92 *U. S.* 1-8, being recognized and it being admitted that upon the taking of testimony before an examiner who has no power to rule upon objections, all the testimony offered should be included, *Held*, that where the testimony is taken under former Rule 67 in another district than that in which the suit is pending upon a motion to the court to compel the witness to answer questions before the examiner, questions which related to an issue which had been eliminated from the controversy by order of the judge where suit was pending, need not be answered. *Independent Baking Powder Co. v. Boarman*, 137 *Fed. R.* 995-996.

Held in a case at law, that if a party assigns no ground of exception the mere objection to evidence offered cannot avail him. *Camden v. Doremus*, 3 *How.* 515-530, 11 *L. ed.* 705.

In that case the objection taken was "The defendant objects to the reading of the deposition." *Held* it was impossible to determine whether the objection applied to form or substance of the deposition.

In a case at law *Held*: where a party objects to the admission of testimony he is bound to state his objection specifically, and in a proceeding for error he is confined to the particular objection taken. *Burton*

v. Driggs, 20 *Wall.* 125, 22 L. ed. 301; *Wood v. Weimar*, 104 *U. S.* 786, 26 L. ed. 782.

An exception taken immediately upon the ruling being made, is indispensable to a review in the proper appellate court. *Railroad Co. v. Heck*, 102 *U. S.* 120, 26 L. ed. 58; *Newport News, etc., Co. v. Pace*, 158 *U. S.* 36, 39 L. ed. 887.

In a case at law, where to the reading in evidence of a deed, the objection was "that it was incompetent, immaterial and irrelevant" and on writ of error it was insisted that the attestation of the copy was not sufficient, *Held*, the objection came too late: that the attention of the court was called only to the competency, materiality and relevancy of the deed, and not to the form of the authentication of the copy. *Wood v. Weimar*, 104 *U. S.* 786-797, 26 L. ed. 779.

On a trial at law the admission in evidence of a deed objected to on the ground it bore on its face evidence of fraud, but pointing out no specific vice, *Held*: the appellate court could not inquire whether the court below decided correctly or incorrectly upon such vague objection. *Thomas v. Lawson*, 21 *How.* 331-338, 16 L. ed. 84.

Where the court decides the fact and law without the intervention of a jury, the admission of illegal testimony even if material is not ground for reversal as the court on appeal will reject the improper evidence and proceed to decide the case as if it were not in the record.

In such case it is proper on the trial, where evidence supposed not to be legal is received by the court to enter on the record that it is objected to. This is done to show it was not received by consent. Marshall, Chief Justice, in *Field v. United States*, 9 *Pet.* 202, 9 L. ed. 94.

Quære: Upon the principle of law stated in the last paragraph is it allowable to make further objection to testimony taken before an examiner after it is returned into court?

That further exceptions to testimony may be taken when the testimony is filed in court stated in the opinion. *Blease v. Garlington*, 92 *U. S.* 1-8, 23 L. ed. 523.

Where, because defendant refused to pay the examiner's fees his testimony was not filed, *Held*, complainant might pay the fees and have it filed, or might proceed without it. *Frese v. Biedenfeld*, 14 *Blatchf.* 402; *Fed. Cases*, 5,111.

RULE L—*Stenographer—Appointment—Fees*

When deemed necessary by the court or officer taking testimony, a stenographer may be appointed who shall take down testimony in shorthand and, if required, transcribe

the same. His fee shall be fixed by the court and taxed ultimately as costs. The expense of taking a deposition, or the cost of a transcript, shall be advanced by the party calling the witness or ordering the transcript.

A substitute for Clause 8 of Rule 67 as promulgated May 15, 1893.

Decisions

Each party should in the first instance pay the costs, including stenographer's and master's fees, for taking his own testimony, leaving the question of their final disposition to be determined when the decree is entered. *Brickill v. The Mayor, etc.*, 55 *Fed. R.* 565.

To the same effect *U. S. Printing Co. v. Am. Playing Card Co.*, 81 *Fed. R.* 506.

RULE LI—*Evidence Taken Before Examiners, etc.*

Objections to the evidence, before an examiner or like officer, shall be in short form, stating the grounds of objection relied upon, but no transcript filed by such officer shall include argument or debate. The testimony of each witness, after being reduced to writing, shall be read over to or by him, and shall be signed by him in the presence of the officer; provided, that if the witness shall refuse to sign his deposition so taken, the officer shall sign the same, stating upon the record the reasons, if any, assigned by the witness for such refusal. Objection to any question or questions shall be noted by the officer upon the deposition, but he shall not have power to decide on the competency or materiality or relevancy of the questions. The court shall have power, and it shall be its duty, to deal with the costs of incompetent and immaterial or irrelevant depositions, or parts of them, as may be just.

A substitute for the last two paragraphs of Clause 2 of Rule 67 as amended October Term, 1890.

Decisions

Costs in equity are in the sound discretion of the court. *Brookes v. Bryan*, 2 *Story*, 553; *Fed. Cases*, 1,949.

Where a bill is dismissed the ordinary course is not to award costs to the plaintiff. *Ib.*

NOTE. For decisions upon the practice before examiners see the cases cited under Rule 62, pages 566-567.

RULE LII—*Attendance of Witnesses Before Commissioner,
Master or Examiner*

Witnesses who live within the district, and whose testimony may be taken out of court by these rules, may be summoned to appear before a commissioner appointed to take testimony, or before a master or examiner appointed in any cause, by subpoena in the usual form, which may be issued by the clerk in blank and filled up by the party praying the same, or by the commissioner, master, or examiner, requiring the attendance of the witnesses at the time and place specified, who shall be allowed for attendance the same compensation as for attendance in court; and if any witness shall refuse to appear or give evidence it shall be deemed a contempt of the court, which being certified to the clerk's office by the commissioner, master, or examiner, an attachment may issue thereupon by order of the court or of any judge thereof, in the same manner as if the contempt were for not attending, or for refusing to give testimony in, the court.

In case of refusal of witnesses to attend or be sworn or to answer any question put by the commissioner, master or examiner or by counsel or solicitor, the same practice shall be adopted as is now practiced with respect to witnesses to be produced on examination before an examiner of said court on written interrogatories.

Substantially the same as Rule 78 of the Rules adopted March 2, 1842.

Decisions

The clerk has authority to issue an ordinary subpoena to testify without a previous order of the court under sec. 863, *Rev. Stats. (U. S. Comp. Stats. 1901, p. 662)*. *Henning v. Boyle*, 112 *Fed. R.* 397-398.

Where the judge of a District Court in whose district testimony is being taken for use in a cause pending in another district refuses an order for subpoena *duces tecum*, *Held*, the remedy is by appeal, that mandamus under sec. 716, *Rev. Stats. (U. S. Comp. Stats. 1901, p. 580)* did not lie even if the refusal was erroneous. *Vacuum Cleaner Co. v. Platt*, 196 *Fed. R.* 398, 116 *C. C. A.* 220.

An order that a subpoena issue for the defendant to give his deposition will be granted complainant. *State of Texas v. Chiles*, 21 *Wall.* 488, 22 *L. ed.* 650.

The Act of Feb. 11, 1893 (27 *Stat. L.* 443) affords complete immunity, and deprives a witness of his privilege not to testify because his evidence may be self-incriminating. Such immunity extends to actions in State courts, as well as in the Federal courts. *Brown v. Walker*, 161 *U. S.* 591-608, 40 L. ed. 825, Oct. T., 1895, four justices dissenting.

The legal immunity given by a State statute while given against a prosecution in the same jurisdiction, will be sufficient to prevent a witness from claiming that he is deprived of his liberty without due process of law if punished for refusal to give testimony. *Jack v. Kansas*, 199 *U. S.* 372-382, 50 L. ed. 237, Oct. T., 1905.

Final decisions in contempt cases in the District Courts are subject to review by writ of error from the Circuit Court of Appeals. *Besette v. W. B. Conkey Co.*, 194 *U. S.* 324-338, 48 L. ed. 1006, Oct. T., 1903.

Orders of court requiring a witness to answer interrogatories or to produce documents are interlocutory and not the subject of appeal. If the witness refuse to comply with such order, and the court exercises the authority conferred by secs. 868-869, *Rev. Stats. (U. S. Comp. Stats.* 1901, pp. 664, 665), to punish him or coerce him into compliance, that will give rise to another and separate case, and a judgment therein will be a final decision subject to review by writ of error, but not by appeal. *Alexander v. United States*, 201 *U. S.* 117-122, 50 L. ed. 689, Oct. T., 1905.

A judgment rendered in a petition filed under sec. 12 of the Interstate Commerce Act of Feb. 4, 1887, to compel a witness duly summoned to testify or produce documents, is final, and subject to a direct appeal to the Supreme Court. *Interstate Commerce Commission v. Baird*, 194 *U. S.* 25-39, 48 L. ed. 867, Oct. T., 1903.

A final order of the Circuit (District) Court dismissing a petition of the commissioners filed under sec. 12 of the Act of Feb. 4, 1887, or requiring the attendance and testimony of witnesses may be enforced by judicial process. *Interstate Commerce Commission v. Brinson*, 154 *U. S.* 447-489, 38 L. ed. 1061, Oct. T., 1894.

RULE LIII—*Notice of Taking Testimony Before Examiner, etc.*

Notice shall be given by the respective counsel or parties to the opposite counsel or parties of the time and place of examination before an examiner or like officer for such reasonable time as the court or officer may fix by order in each case.

Same as Clause 4 of Rule 67 promulgated December Term, 1864, 1 *Black*, 6.

RULE LIV—*Depositions Under Rev. Stat., secs. 863, 865, 866, 867—Cross-Examination*

After a cause is at issue, depositions may be taken as provided by secs. 863, 865, 866 and 867, Revised Statutes. But if in any case no notice has been given the opposite party of the time and place of taking the deposition, he shall, upon application and notice, be entitled to have the witness examined orally before the court, or to a cross-examination before an examiner or like officer, or a new deposition taken with notice, as the court or judge under all the circumstances shall order.

Substantially the same as Rule 68 of the Rules adopted March 2, 1842.

Statutory Provisions

Rev. Stats., sec. 863, U. S. Comp. Stats. 1901, p. 662. The testimony of any witness may be taken by deposition *de bene esse* when the witness lives at a distance of more than one hundred miles from the place of trial, or is bound on a voyage to sea, or about to go out of the district to a distance greater than one hundred miles from the place of trial, or when ancient and infirm. The officers before whom taken named; reasonable notice in writing to be given which shall state the name of the witness and time and place of the taking. Any person may be compelled to appear and depose as in a court.

Rev. Stats., sec. 864, U. S. Comp. Stats. 1901, p. 663. Every person deposing shall be sworn, the testimony to be reduced to writing or typewriting by the officer taking the deposition or some person under his personal supervision or by deponent in the officer's presence and afterwards subscribed. As amended by Act May 23, 1900, c. 541, 31 *Stat. L.* 182.

Rev. Stats., sec. 865, U. S. Comp. Stats. 1901, p. 663. Magistrate to retain the deposition until he personally delivers it into court, or be sealed and directed (transmitted) to such court, with his certificate of (for) taking it and of the notice given the adverse party; in such case to remain under seal until opened in court. Such deposition is not to be used unless the court is satisfied the witness is dead or unable to appear in court.

By Act of Aug. 15, 1876, ch. 304, notaries public of the several States and Territories and the District of Columbia are authorized to take depositions, and to do all other acts in relation to taking testimony to be used in the Federal courts and take acknowledgments and affidavits, with the same effect as commissioners of U. S. Circuit Courts.

Rev. Stats., sec. 917, U. S. Comp. Stats. 1901, p. 684. The Supreme Court has power to prescribe the mode of taking and obtaining evidence.

Rev. Stats., sec. 1750, U. S. Comp. Stats. 1901, p. 1196. Secretaries of

legation and consular officers empowered to administer oaths and take depositions and perform any notarial act, which any notary public is authorized to take in the United States by law.

Rev. Stats., sec. 866, *U. S. Comp. Stats.* 1901, p. 663. Where necessary to prevent a failure or delay of justice any court of the United States may grant a *dedimus* to take depositions according to common usage, and as a court of equity the Circuit Court may direct depositions taken *in perpetuam*, if the subject-matter is cognizable in a Federal court. Secs. 863–865 not to apply to depositions under this section.

Rev. Stats., sec. 867, *U. S. Comp. Stats.* 1901, p. 664. Federal courts may admit in evidence depositions taken *in perpetuam* which are by the State law admissible in a State court.

Rev. Stats., secs. 871–873, *U. S. Comp. Stats.* 1901, p. 664. Provisions for taking testimony of witnesses in the District of Columbia to be used in suits in any State, territory, or foreign country.

Rev. Stats., sec. 875, *U. S. Comp. Stats.* 1901, p. 664. Letters rogatory from the United States to foreign countries and from foreign countries to the United States, amended by the Act of Feb. 27, 1877 (19 *Stat. L.* 240, ch. 69), giving the commissioner appointed to take the testimony power to compel witnesses to appear and to testify when letters are from a foreign court to a Federal court.

Decisions

Under the Act of Mar. 9, 1892 (ch. 14, 27 *Stat. L.* 7), clerks of a Federal court may issue a commission to take testimony in the manner prescribed by the laws of the State where such court is held. *Carara Paint Agency Co. v. Carara Paint Co.*, 137 *Fed. R.* 319–320.

Where a party is inflicting upon his adversary an unnecessary burden in taking depositions of an unusually large number of witnesses, the court to prevent the abuse of its process may limit the number. *Ib.* 320.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held* the language of sec. 863, *Rev. Stats.* (*U. S. Comp. Stats.* 1901, p. 662), is to be read in connection with former Rule 68 in an equity cause. Testimony in an equity cause may not be taken by deposition under sec. 863, *Rev. Stats.* (*U. S. Comp. Stats.* 1901, p. 662), until the cause is at issue. *Stevens v. Missouri, K. & T. R. Co.*, 104 *Fed. R.* 934–937.

A cause is at issue for the purpose of taking proof within the time prescribed by the Rule only when at issue as to all the defendants, or at issue as to some, and an issue has been waived by the others by allowing the bill to be taken as confessed. *Gilbert v. Van Armon*, 1 *Flip.* 421; *Fed. Cases*, 5,414.

Where complainant unreasonably delays compelling an issue, any defendant as to whom the cause is at issue may have a rule against him to speed the cause on pain of having his bill dismissed. *Ib.*

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, an unreasonable delay by complainant after a joinder of issue, without taking testimony, gave the defendant a right to dismiss the action for failure to prosecute. *Mackaye v. Mallory*, 80 *Fed. R.* 257, 25 *C. C. A.* 397.

Any defendant whose answer is sufficient has the right to have the cause as to him put at issue, that he may take his testimony. Where it is not proper to compel complainant to go to proof because the cause is not at issue as to all the defendants, the court on proper application will enlarge the time for plaintiff to take proofs in respect to the defendants as to whom the cause is at issue. *Coleman v. Martin*, 6 *Blatchf.* 291; *Fed. Cases*, 2,986.

The mode of taking depositions *de bene esse*, is the same as that designated by former Equity Rule 67. The mode of taking depositions under secs. 863-865, *Rev. Stats. (U. S. Comp. Stats., p. 662)*, is by oral questions put at the time, if desired, and not necessarily by written interrogatories. It is the mode provided by former Rule 67.

The direct examination may be on written interrogatories, yet the defendant has the right to cross-examine orally. *Bishoffchen v. Balzer*, 10 *Fed. R.* 134.

A deposition *de bene esse* cannot be used at the trial if the presence of the witness is attainable, and the party offering it knew or ought to have known it. If a witness lived more than 100 miles away when his deposition was taken it will be presumed that he continues to live there at the time of trial. If the witness is present in court ready to testify, his deposition *de bene esse* is not admissible. *Whitford v. County of Clark*, 119 *U. S.* 522-524, 30 *L. ed.* 500, Oct. T., 1896.

Depositions taken under sec. 866, *Rev. Stats. (U. S. Comp. Stats. 1901, p. 663)*, are not within the rule above announced (hence may be read even if the witness be present). *Ib.* 525.

When the statutes of the United States make special provisions as to the competency or admissibility of testimony they must be followed and not the laws or practice of the State in which the Federal court is held. *Ib.* 525.

Secs. 863-865, *Rev. Stats. (U. S. Comp. Stats. 1901, pp. 662-663)*, relating to taking depositions *de bene esse*, have no application to the examination of a witness upon a *dedimus* or commission under sec. 866, *Rev. Stats. (U. S. Comp. Stats. 1901, p. 663)*, citing *Seargent's Lessee v. Biddle*, 4 *Wheat.* 508; *Jones v. Oregon Cent. Ry. Co.*, 3 *Sawyer.* 523; *Fed. Cases*, 7,486.

Testimony may be taken *in perpetuum* under sec. 866, *Rev. Stats. (U. S. Comp. Stats. 1901, p. 663)*, before issue joined. *N. Y. & B. C. P. Co. v. N. Y. C. P. Co.*, 11 *Fed. R.* §13.

The right of a party to obtain testimony where it is necessary to prevent a failure or delay of justice is preserved by sec. 866, *Rev. Stats.* (*U. S. Comp. Stats.* 1901, p. 663), upon application to the court. *Flower v. MacGinniss*, 112 *Fed. R.* 377-378, 50 *C. C. A.* 291.

"Common usage" as used in sec. 866 (*Rev. Stats.*, *U. S. Comp. Stats.* 1901, p. 663), is the rule or law governing the practice of the court at the time. *Bischoffsheim v. Baltzer*, 10 *Fed. R.* 1-3.

Depositions *de bene esse* may be taken under authority of sec. 863, *Rev. Stats.* (*U. S. Comp. Stats.* 1901, p. 662), on notice from one party to the other without a commission. When they are taken under the authority of sec. 866, *Rev. Stats.*, the commission must be issued. Where the only authority for taking depositions under a commission is to be found in sec. 866 then the words "common usage" require them to be taken on written interrogatories and cross-interrogatories. *Encyclopedia Britannica Co. v. Werner Co.*, 138 *Fed. R.* 461-462.

Previous to 1861 the rule authorized depositions to be taken under a commission on oral interrogatories, provided the parties agreed thereto, but former Rule 67 was amended in 1861 by adding to it provisions making oral examinations the rule if either party desired it, and examinations by written interrogatories the exception. *Ib.* 462.

Where a commission is applied for to take the testimony of witnesses in a foreign country, the defendants may insist that they be permitted to conduct their cross-examination orally, and if the commission so provides, the direct examination may also be oral, if the complainant desires it. *Ib.*

Depositions *de bene esse* cannot be taken in a foreign country under sec. 863, *Rev. Stats.* (*U. S. Comp. Stats.* 1901, p. 662). Ordinary depositions may be taken before consular officers under sec. 1,750, *Rev. Stats.*, but depositions *de bene esse* are not ordinary notarial acts, such as a notary could perform simply by virtue of his office. *The Alexandra*, 104 *Fed. R.* 904-907.

The proper course is by commission, where there may be an oral examination of the witnesses. *Cortes Co. v. Tannhauser*, 18 *Fed. R.* 667.

Where a deposition is taken of witnesses speaking a foreign language and their counsel had read to them the interrogatories and prepared their answers in English before the examiner had actually taken the evidence, *Held*, that the examination of the witnesses must be by the examiner and not by counsel, although the fact that the witnesses had heard the interrogatories in advance would not alone have been fatal. *Western, etc., R. Co. v. Drew*, 3 *Woods*, 691; *Fed. Cases*, 17,434.

Sec. 863, *Rev. Stats.* (*U. S. Comp. Stats.* 1901, p. 662), provides that testimony may be taken in admiralty and equity causes in practically

the same manner as it is taken in legal actions, where all that was required to take testimony by deposition *de bene esse* was that a litigant give notice to the opposite party that he proposed to take the testimony of certain witnesses named, before a notary public anywhere, and the parties then go before a notary and he takes their testimony. By former Rule 68 this privilege was granted in equity causes (after they were at issue), the same as theretofore was done in legal actions. *Ib.* 936.

When testimony is taken *de bene esse* in equity, on a notice merely, the proceeding must be in accordance with the Rule, and the word "depending" in sec. 863, *Rev. Stats. (U. S. Comp. Stats. 1901, p. 662)*, must be understood to mean that the cause be at issue. Until the cause is at issue, no testimony can be taken in it under the statute last mentioned. *Ib.* 937.

Where a party presents facts which entitle him to take testimony by depositions under sec. 863, *Rev. Stats. (U. S. Comp. Stats. 1901, p. 662)*, the Act of Congress of Mar. 9, 1892 (ch. 14, 27 *Stat. L.* 7) does not limit him to taking the depositions orally before an authority named in the notice, but provides an additional method in which it shall be lawful to take the depositions in the mode prescribed by the laws of the State in which the court is held. *Magone v. Colorado S. & M. Co.*, 135 *Fed. R.* 846-849.

Under sec. 866, *Rev. Stats. (U. S. Comp. Stats. 1901, p. 663)*, a mere affidavit that the witness lives more than 100 miles from the place of trial does not warrant the awarding of a *dedimus*, but there should be a showing of the necessity of the taking of such deposition to prevent the failure or delay of justice. *Ib.* 848.

Where no statute of the State where the court is held provides otherwise, the deposition taken under sec. 863, *Rev. Stats. (U. S. Comp. Stats. 1901, p. 662)*, should be taken orally before an authority named in the order, but by the Act of Mar. 9, 1892, in addition to the modes of taking depositions in the Federal courts depositions may be taken in the manner prescribed by the laws of the State in which the courts are held. The statute adopting the State practice as to the manner of taking depositions in no way enlarges or restricts the grounds of taking depositions as declared by the Federal statutes, secs. 866 and 863, *Rev. Stats. (U. S. Comp. Stats. 1901, pp. 662 and 663)*. *Ib.* 848.

Under sec. 863, *Rev. Stats. (U. S. Comp. Stats. 1901, p. 662)*, the subpoena *duces tecum* for the production of documents may be issued by the clerk of the district where the testimony is being taken, when directed by order of the court. *Crocker-Wheeler Co. v. Bullock*, 134 *Fed. R.* 241-242.

A Federal court has power to issue subpoena *duces tecum* under sec. 863, *Rev. Stats. (U. S. Comp. Stats. 1901, p. 662)*. Such subpoena does not issue as of course by the clerk but only upon order of the court, on

preliminary proof, after proper investigation into the materiality and competency of the evidence, and that the same is in the possession of the witness. The court will not finally determine the question of materiality on such application, but it must be reasonably satisfied that such evidence is relevant and material. *Dancel v. Goodyear Shoe Machinery Co.*, 128 *Fed. R.* 753-762.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, former Rules 67, 68, and 78 recognized three methods of taking proof: (1) According to the Acts of Congress; (2) under a commission; (3) before a master or examiner appointed in the cause, where the witnesses live within the district; and were a readoption of Rules 25, 26, and 28 of the Rules of Equity of 1822. *Van Hook v. Pendleton*, 2 *Blatchf.* 84; *Fed. Cases*, 16,852.

When exceptions are intended to be taken to interrogatories or cross-interrogatories, they should be propounded as objections before the commission issues, when they may be ruled upon by the court. *Cocker v. Franklin H. & B. Co.*, 1 *Story*, 169; *Fed. Cases*, 2,930.

Under the general interrogatory the witness may give evidence of any matter pertinent to the cause, which he might have done, if such matter had formed the subject of a particular interrogatory, and it is no objection that counsel for the other side are unapprised of what the witness deposes. *Rhoades v. Selin*, 4 *Wash. C. C.* 715; *Fed. Cases*, 11,740.

It is no objection to a deposition that a material part of the evidence comes in response to the general interrogatory. *Ib.*

Held, in a case at law, that all the interrogatories should be answered, because questions are thereafter put on the supposition that all will be answered. *Bell v. Davidson*, 3 *Wash. C. C.* 328; *Fed. Cases*, 1,248.

Under the former practice *Held*, if the general interrogatory was not answered the deposition might be suppressed. *Richardson v. Golden*, 3 *Wash. C. C.* 109; *Fed. Cases*, 11,782.

If the general interrogatory was not answered it was fatal. *Dodge v. Israel*, 4 *Wash. C. C.* 323; *Fed. Cases*, 3,952.

Held, in a case at law, that the deposition could not be read because of omission to put all the questions to the witness. *Gilpins v. Consequa*, *Pet. C. C.* 85; *Fed. Cases*, 5,452.

It is no objection that the cross-interrogatories were put after all the chief interrogatories were answered. *Ib.*

Nor is it an objection that the deposition is in English and the commissioners were foreigners and they fail to state they had a sworn interpreter. *Ib.*

Where the direct examination of a witness was taken by a commissioner, but no cross-interrogatories were filed, after death of the witness, *Held*, the deposition should be read. *Gass v. Stinson*, 3 *Sumn.* 98; *Fed. Cases*, 5,262.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, former Rule 70 was not intended for the examination of a party to the cause. *Estava v. Mazange's Adm.*, 1 *Woods*, 623; *Fed. Cases*, 4,527.

A deposition should not be suppressed because in the caption it fails to name each of the copartners of a firm, or because it fails to state therein that the place where the testimony is to be taken is distant more than 100 miles, if the court judicially knows it is. *Egbert v. Citizens' Ins. Co.*, 7 *Fed. R.* 47.

Where the officer fails to certify that he delivered the depositions to the court, or that he sealed them and deposited them in the post office at the place where taken, if in fact they came through the mails from such place, addressed to the clerk of the court, and were duly received from the post office by him, marked with the style of the case, and the usual endorsement across the seal, the deposition will not be suppressed. *Ib.* 49-50.

No special provision is made by the rules respecting the transmission or custody of depositions. Where sent by mail the fact that in transmission the envelope has been abraded so that it is open, will not be ground to suppress the deposition. *Eiffert v. Craps*, 44 *Fed. R.* 164.

In an action at law, *Held*, that a deposition taken may be read although the witness is present in court, subject to the right of the adverse party to place him on the witness stand. *Whitford v. Clark County*, 13 *Fed. R.* 837.

The note to this case cites authorities to the contrary.

RULE LV—*Deposition Deemed Published when Filed*

Upon the filing of any deposition or affidavit taken under these rules or any statute, it shall be deemed published, unless otherwise ordered by the court.

A new Rule promulgated November 4, 1912.

Decisions

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, the general rule was that after publication of the testimony no new witnesses could be examined and no new evidence taken. *Wood v. Mann*, 2 *Sumn.* 316; *Fed. Cases*, 17,953.

There is no absolute rule prohibiting the allowance of new testimony after publication, but it rests in the sound discretion of the court to be exercised cautiously and only when indispensable to the merits and justice of the cause. *Ib.*

Upon a rehearing, or a bill of review, or bill in the nature of a bill of review, if the evidence of new witnesses ought to be let in to avoid expenses and circuity of remedy, it should be done. *Ib.*

New evidence after publication should not be taken, except when the judge entertains a doubt, or when some additional fact or inquiry is indispensable to enable him to make a satisfactory decree. *Ib.*

When evidence will be received after publication of the testimony; the several exceptions to the general rule enumerated. *Ib.*

RULE LVI—On Expiration of Time for Depositions, Case Goes on Trial Calendar

After the time has elapsed for taking and filing depositions under these rules, the case shall be placed on the trial calendar. Thereafter no further testimony by deposition shall be taken except for some strong reason shown by affidavit. In every such application the reason why the testimony of the witness cannot be had orally on the trial, and why his deposition has not been before taken, shall be set forth, together with the testimony which it is expected the witness will give.

A new Rule promulgated November 4, 1912.

Decisions

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, former Rule 69 had no application to a hearing before a master to take testimony as to damages on an injunction bond. *Coosaw Mining Co. v. Farmer's Mining Co.*, 67 *Fed. R.* 31.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, the refusal of the Circuit Court to suppress depositions taken after the time limited by former Rule 69 was within the exercise of its discretion. *Grant v. Phenix Life Ins. Co.*, 121 *U. S.* 105-116, 30 *L. ed.* 395.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, testimony taken more than three months after the filing of the replication might be received at the hearing in the discretion of the court under former Rule 69. *Fisher v. Hayes*, 6 *Fed. R.* 76-78.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, the limitation of three months allowed by former

Rule 69 for taking testimony applied as much to the defendants as to complainants. *Ingle v. Jones*, 9 *Wall.* 486-499, 19 L. ed. 621.

A distinction was made between documentary and oral evidence, the former being not subject to variance to suit altered conditions. *Ib.*

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, where three months after the filing of replication had elapsed without the taking of any testimony, or any motion to extend the time, and thereafter plaintiff moved to strike out portions of the answer, there was no error in setting the cause down for hearing on bill and answer after such motion was denied. *McGorray v. O'Connor*, 87 *Fed. R.* 586-588, 31 *C. C. A.* 114.

RULE LVII—*Continuances*

After a cause shall be placed on the trial calendar it may be passed over to another day of the same term, by consent of counsel or order of the court, but shall not be continued beyond the term save in exceptional cases by order of the court upon good cause shown by affidavit and upon such terms as the court shall in its discretion impose. Continuances beyond the term by consent of the parties shall be allowed on condition only that a stipulation be signed by counsel for all the parties and that all costs incurred theretofore be paid. Thereupon an order shall be entered dropping the case from the trial calendar, subject to reinstatement within one year upon application to the court by either party, in which event it shall be heard at the earliest convenient day. If not so reinstated within the year, the suit shall be dismissed without prejudice to a new one.

A new Rule promulgated November 4, 1912.

Decisions

Under the rules in force prior to the revision promulgated November 4, 1912, where upon bill, answer, and replication after time to take testimony had expired the case was dismissed upon submission by defendant, the decree reciting the equities were with defendant who was decreed costs: *Held*, such dismissal was a bar to a new suit between the parties. *Lyon v. Perin, etc., Co.*, 125 *U. S.* 698, 31 L. ed. 841.

Where a complainant was granted leave to dismiss a bill, *Held*, that the decree allowing the dismissal of the bill should not be reversed unless it clearly appears that there was a violation of some established rule

prevailing in equity, or an abuse of the legal discretion of the court. *Penn. Pho. Co. v. Columbia Pho. Co.*, 132 *Fed. R.* 808-809, 66 *C. C. A.* 127.

After an interlocutory decree on the merits referring the cause to a master to take an account, the defendant acquires such an interest in the suit, that the complainant cannot discontinue as of right. *Garner v. Second Nat'l Bk.*, 67 *Fed. R.* 833-836, 16 *C. C. A.* 86.

An order allowing such dismissal will not be made, where a new contest will thereby be rendered possible over any question therein at issue. *Ib.* 836.

Unless there is an obvious violation of a fundamental rule of a court of equity, or an abuse of the discretion of the court, the decision of a motion for leave to dismiss a bill on application of the complaint will not be reviewed on appeal. *Pullman Car Co. v. Central Trans. Co.*, 171 *U. S.* 138-146, 43 *L. ed.* 112.

RULE LVIII — *Discovery — Interrogatories — Inspection and Production of Documents — Admission of Execution or Genuineness*

The plaintiff at any time after filing the bill and not later than twenty-one days after the joinder of issue, and the defendant at any time after filing his answer and not later than twenty-one days after the joinder of issue, and either party at any time thereafter by leave of the court or judge, may file interrogatories in writing for the discovery by the opposite party or parties of facts and documents material to the support or defense of the cause, with a note at the foot thereof stating which of the interrogatories each of the parties is required to answer. But no party shall file more than one set of interrogatories to the same party without leave of the court or judge.

If any party to the cause is a public or private corporation, any opposite party may apply to the court or judge for an order allowing him to file interrogatories to be answered by any officer of the corporation, and an order may be made accordingly for the examination of such officer as may appear to be proper upon such interrogatories as the court or judge shall think fit.

Copies shall be filed for the use of the interrogated party and shall be sent by the clerk to the respective solicitors of

record, or to the last known address of the opposite party if there be no record solicitor.

Interrogatories shall be answered, and the answers filed in the clerk's office, within fifteen days after they have been served, unless the time be enlarged by the court or judge. Each interrogatory shall be answered separately and fully and the answers shall be in writing, under oath, and signed by the party or corporate officer interrogated.

Within ten days after the service of interrogatories, objections to them, or any of them, may be presented to the court or judge, with proof of notice of the purpose so to do, and answers shall be deferred until the objections are determined, which shall be at as early a time as is practicable. In so far as the objections are sustained, answers shall not be required.

The court or judge, upon motion and reasonable notice, may make all such orders as may be appropriate to enforce answers to interrogatories or to effect the inspection or production of documents in the possession of either party and containing evidence material to the cause of action or defense of his adversary. Any party failing or refusing to comply with such an order shall be liable to attachment, and shall also be liable, if a plaintiff, to have his bill dismissed, and, if a defendant, to have his answer stricken out and be placed in the same situation as if he had failed to answer.

By a demand served ten days before the trial, either party may call on the other to admit in writing the execution or genuineness of any document, letter or other writing, saving all just exceptions; and if such admission be not made within five days after such service, the costs of proving the document, letter or writing shall be paid by the party refusing or neglecting to make such admission, unless at the trial the court shall find that the refusal or neglect was reasonable.

A new Rule promulgated November 4, 1912.

Decisions

Complainant is entitled to a discovery only of such documents and facts as will aid in the maintenance of his title or cause of action. *Kelley v. Boettcher*, 85 *Fed. R.* 55-60, 29 C. C. A. 14.

The statutes permitting parties to be called as witnesses and exam-

ined have not curtailed the power of courts of equity to compel a discovery. *Ib.* 67.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, a bill in equity for a discovery merely was unnecessary since a party might be examined as a witness. *Heath v. Erie R. Co.*, 9 *Blatchf.* 316; *Fed. Cases*, 6,307.

Bills for discovery solely are not generally sustained at this day. *Ex parte Boyd*, 105 *U. S.* 647-657, 26 *L. ed.* 1200.

A State statute authorizing examination of defendant on oath before trial has no application to suits in equity in United States courts. *Dravo v. Fabel*, 132 *U. S.* 487, 33 *L. ed.* 422.

After defendant has answered interrogatories but evasively, the court may give plaintiff leave to put additional interrogatories so as to compel a direct and positive disclosure. *Langdon v. Goddard*, 3 *Story*, 13; *Fed. Cases*, 8,061.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, no one but a defendant could be compelled to answer interrogatories in a bill. *French v. First Nat. Bank*, 7 *Ben.* 488; *Fed. Cases*, 5,099.

The great weight of authority, as well as a due regard for the right of the community to have the wheels of justice unclogged, as far as may be consistent with the liberty of the individual, leads us to reject the doctrine that a witness may avoid answering any question by the mere statement that the answer would criminate him. The true rule is that it is for the judge, before whom the question arises, to decide whether an answer to the question put may reasonably have a tendency to criminate the witness, or to furnish proof of a link in the chain of evidence necessary to convict him of crime. Taft, J., in *Ex parte Irvine*, 74 *Fed. R.* 954-960.

The reasons for refusing to answer interrogatories should be distinctly stated so the court may be able to judge whether the refusal stands upon sufficient grounds. *Boyer v. Keller*, 113 *Fed. R.* 580-581.

If defendant attempts to protect himself from answering by demurrer he is also obliged to specify the reasons for asking protection. *Ib.* 581.

The facts which entitle a witness to protect himself from answering must be stated so the court may upon those facts decide whether he is protected. The right to call the defendant as a witness does not justify the court in declining to require interrogatories to be answered, since

this practice often enables the evidence to be put in the pleadings with great benefit. *Slater v. Banwell*, 50 *Fed. R.* 150-151.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, where he did not derive the information in his official capacity, an officer of a corporation, complainant, could not be made defendant to a cross-bill for the purpose of discovery, it being a rule that a mere witness cannot be joined for the purposes of discovery, and this rule has been extended to members of a corporation who are not officers. *McComb v. Chicago, St. L. & N. Or. Co.*, 7 *Fed. R.* 426-428.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, a corporation must answer under its corporate seal and not under oath, although the bill prayed for an answer upon the oath of its proper officers. *French v. First Nat. Bank*, 7 *Ben.* 488; *Fed. Cases*, 5,099.

Upon such prayer, *Held*, that a corporation was not bound to answer, and that the officers of the corporation could not be compelled to answer because they were not parties. *Ib.*

Where a corporation is the sole party defendant it is its duty to put in a true and complete answer, if required, the same as a natural person, except that it puts in its answer under the corporate seal. To enable it to make a complete answer it must cause diligent examination to be made of all documents in its possession. *Continental Bank v. Heilman*, 66 *Fed. R.* 184.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, it was the usual rule to join some principal officer of the corporation as a party in a suit for discovery. *Ib.*

RULE LIX—*Reference to Master—Exceptional, not Usual*

Save in matters of account, a reference to a master shall be the exception, not the rule, and shall be made only upon a showing that some exceptional condition requires it. When such a reference is made, the party at whose instance or for whose benefit it is made shall cause the order of reference to be presented to the master for a hearing within twenty days succeeding the time when the reference was made, unless a longer time be specially granted by the court or judge; if he shall omit to do so, the adverse party shall be at liberty forthwith to cause proceedings to be had before the master, at the costs of the party procuring the reference.

A new Rule promulgated November 4, 1912.

Decisions

Complex and intricate accounts ought to be referred to a master. *Dubouig de St. Colombe v. United States*, 7 *Pet.* 625-626, 8 L. ed. 807.

It is in the discretion of courts to ascertain the facts themselves, if the testimony will enable them to do so, instead of referring them to a master. *Field v. Holland*, 6 *Cranch*, 822, 3 L. ed. 136.

Where the court has means to satisfactorily take the account and is disposed to do so, the inquiry will not be referred to a master unless both sides desire it. *Jewett v. Cunard*, 3 *Wood & M.* 277; *Fed. Cases*, 1,710.

The court itself may state the account after an examination of the testimony taken by the master if for any reason it seems proper to do so. *Wheeler v. Billings*, 72 *Fed. R.* 301-304, 181 *C. C. A.* 573.

A proper case for the exercise of the court's discretion is where the court has reason to believe that if the master's report was filed in the ordinary form it would be compelled on exceptions filed thereto, to examine and review all the testimony on which the master's findings were based, and that by stating the account itself, it might speed the cause. *Ib.*

Where the bill presents a case in which it is necessary an account be taken it may be referred to a master on the presentation of the bill without notice to the defendant. *Briggs v. Neal*, 120 *Fed. R.* 224-227, 56 *C. C. A.* 572.

Upon a creditor's bill brought on behalf of such creditor and such other creditors as may become parties, the usual and correct course is to open a reference in the master's office, and give other creditors having valid claims against the fund an opportunity to come in and have the benefit of the decree. *Johnson v. Waters*, 111 *U. S.* 640-674, 28 L. ed. 547.

When there are matters to be investigated which, although under the province of the court, are such that the presiding judge cannot at the hearing effectually deal with, they should be referred to a master to inquire and impart the necessary information. *Coosaw Min. Co. v. Farmer's Min. Co.*, 67 *Fed. R.* 31-33.

It is discretionary with the court to refer the case back to a master to reopen the proofs. New evidence discovered after the hearing before the matter is closed, may in proper cases be ground for a bill of review. A defendant is not concluded by the refusal of the court on mere affidavits to refer the cause back to the master. *Thompson v. Wooster*, 114 *U. S.* 104-118, 29 L. ed. 105.

Where an account is stated by a master instead of setting it aside as a whole, the court should pass its judgment upon each of the exceptions, or remand the account with directions as to the principles upon which it should be stated. *Kelsey v. Hobbey*, 16 *Pet.* 269-276, 10 L. ed. 961.

A cause cannot be referred to a master to report his findings of fact and conclusions of law over the objection of one of the parties. Parties to a suit in equity are entitled to the judgment of the court below upon the issues and especially on the points of law raised in the controversy. *Garinger v. Palmer*, 126 *Fed. R.* 906-910, 61 *C. C. A.* 436.

Upon written consent of the parties entered as an order of the court, all questions of law and fact may be referred to a master and his finding is usually conclusive. *Kimberly v. Arms*, 129 *U. S.* 512-524, 32 L. ed. 764.

The court cannot of its own motion, or upon the request of one party, refer questions of law to a master. *Ib.* 524.

RULE LX—*Proceedings Before Master*

Upon every such reference, it shall be the duty of the master, as soon as he reasonably can after the same is brought before him, to assign a time and place for proceedings in the same, and to give due notice thereof to each of the parties, or their solicitors; and if either party shall fail to appear at the time and place appointed, the master shall be at liberty to proceed *ex parte*, or, in his discretion, to adjourn the examination and proceedings to a future day, giving notice to the absent party or his solicitor of such adjournment; and it shall be the duty of the master to proceed with all reasonable diligence in every such reference, and with the least practicable delay, and either party shall be at liberty to apply to the court, or a judge thereof, for an order to the master to speed the proceedings and to make his report, and to certify to the court or judge the reason for any delay.

Same as Rule 75 of the Rules adopted March 2, 1842.

Decisions

The master should appoint a day for proceedings and give notice to the parties or their solicitors. If the plaintiff requires evidence in the possession of the defendant he should be ordered to produce it. *Kerosene L. H. Co. v. Fisher*, 1 *Fed. R.* 91-92.

Where the master has ordered several adjournments, it is in his discretion to further adjourn the hearing to accommodate counsel of one

party over objection of counsel for the other party. *Third National Bank v. National Bank*, 86 *Fed. R.* 852-857, 30 *C. C. A.* 436.

The court will decline to give directions as to the order to be observed in taking testimony, or other proceedings before the master. *Wooster v. Gumbirner*, 20 *Fed. R.* 167.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, witnesses who had already been examined before the court could not again be examined before the master without a special order of the court. Such an order when obtained would be limited to such facts as were not testified to by the witnesses. *Jenkins v. Eldridge*, 3 *Story*, 299; *Fed. Cases*, 7,267.

RULE LXI—*Master's Report—Documents Identified but not Set Forth*

In the reports made by the master to the court, no part of any state of facts, account, charge, affidavit, deposition, examination, or answer brought in or used before him shall be stated or recited. But such state of facts, account, charge, affidavit, deposition, examination, or answer shall be identified, and referred to, so as to inform the court what state of facts, account, charge, affidavit, deposition, examination, or answer were so brought in or used.

Same as Rule 76 of the Rules adopted March 2, 1842.

Decisions

The master's report settles no rights. Its office is to present the case to the court, and the court's action, not the report, determines the rights of the parties. *Railroad Co. v. Swasey*, 23 *Wall.* 405-410, 23 *L. ed.* 136.

The report of the master is received as true where no exceptions are taken. *Harding v. Handy*, 11 *Wheat.* 103-127, 6 *L. ed.* 429.

The purpose of filing exceptions before the master is to save time and give him an opportunity to reconsider his opinions. *Story v. Livingston*, 13 *Pet.* 366, 10 *L. ed.* 200.

The exceptions should state article by article the parts of the report which are intended to be excepted to. *Ib.*

RULE LXII—*Powers of Master*

The master shall regulate all the proceedings in every hearing before him, upon every reference; and he shall have full

authority to examine the parties in the cause, upon oath, touching all matters contained in the reference; and also to require the production of all books, papers, writings, vouchers, and other documents applicable thereto; and also to examine on oath, *viva voce*, all witnesses produced by the parties before him, or by deposition, according to the acts of Congress, or otherwise, as here provided; and also to direct the mode in which the matters requiring evidence shall be proved before him; and generally to do all other acts, and direct all other inquiries and proceedings in the matters before him, which he may deem necessary and proper to the justice and merits thereof and the rights of the parties.

Substantially the same as Rule 77 of the Rules adopted March 2, 1842.

Statutory Provisions

Sec. 858, *Rev. Stats.*, amended June 29, 1906, c. 3608, 34 *Stat. L.* 618, *U. S. Comp. Stats. Supp.* 1901, p. 242, reads as follows:

"Sec. 858. The competency of a witness to testify in any civil action, suit or proceeding in the courts of the United States shall be determined by the laws of the State or territory in which the court is held."

Decisions

The master is the court's representative, and it is his duty to pass on all the questions of procedure as they come before him and hear the parties fully, to relieve the court of the necessity of passing on the materiality of disputed questions as they may arise in the progress of the hearing, but the court will correct the errors, if any, upon the coming in of his report upon exceptions properly taken. *Hoe v. Scott*, 87 *Fed. R.* 220.

The extent of the master's inquiry and whether he should take or refuse evidence are within his province to pass upon. *Ib.*

The master has no authority beyond his commission. Even with the consent of the parties he may not go into matters not referred to him. *Gordon v. Hobart*, 2 *Story C. C.* 243; *Fed. Cases*, 5,608.

The master has the same discretion to order the proceedings before him which the court would have. *Story v. Livingston*, 13 *Pet.* 359-368, 10 *L. ed.* 200.

The master has no right to review, reject, or disregard the order, directions or decrees of the court under which he is appointed. *Felch v. Hooper*, 4 *Clifford*, 489; *Fed. Cases*, 4,718.

The courts in certain cases will grant a new hearing after decree, but no review of the matters determined in its decree can be had upon exceptions to the master's report. *Ib.*

Upon certification by the special examiner to compel a witness to answer an interrogatory, *Held* by the court, that in case of doubt as to the relevancy or propriety of questions asked on cross-examination the witness should be required to answer. *Whitehead & Hoag Co. v. O'Callahan*, 130 *Fed. R.* 343, 64 *C. C. A.* 588.

Under the rules in force prior to the revision promulgated November 4, 1912, under former Rule 77 the defendant might be required to produce correspondence applicable to the subject-matter of the reference. *Goss Printing Press Co. v. Scott*, 119 *Fed. R.* 941.

An officer of a defendant corporation can be compelled to bring its books before the master and his failure to so do will subject him to a penalty for contempt. The authority is directly conferred by the Rule. *Erie Ry. Co. v. Heath*, 8 *Blatchf.* 413; *Fed. Cases*, 4,513.

In this case an attachment was issued, non-bailable until the books were produced, and then to be bailable in a named sum.

An exception should always be taken on the spot to each ruling of the master that the party intends to contest, and it is the duty of the master to note the fact in his minutes. The exception need not be drawn up in form. The reason for the practice exists in the fact that, if the party in whose favor the ruling was made is notified that an exception is taken and the question is to be revised, he can waive the point by admitting or withdrawing the evidence. *Troy Iron & N. Factory v. Corning*, 6 *Blatchf.* 328; *Fed. Cases*, 14,196.

Where evidence is offered before the master and its competency or admissibility is objected to by the adverse party, the master should receive the evidence subject to the objection and this action may be reviewed by the court after the report comes in. *Kansas L. & T. Co. v. Electric Ry., etc., Co.*, 108 *Fed. R.* 702-704.

All questions upon the evidence, its materiality and sufficiency, are to be determined by the trial court and after it the appellate court. *Nelson v. United States*, 201 *U. S.* 92, 50 *L. ed.* 673.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, former rules prescribed by the Supreme Court, 77 to 83, established a simple and expeditious procedure in themselves, dispensing with the old formalities of the Court of Chancery in England. *Hatch v. Indianapolis and S. R. Co.*, 9 *Fed. R.* 856-859. *Held*, further:

Where testimony had been taken upon a reference embracing questions of law and fact and the case had been argued before the master,

a party was not entitled to receive a draft of the report, and again argue the same before it was filed. *Ib.*

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, the general rule of chancery that if the complainant examined a defendant as a witness it was a waiver of his right to a decree against him was not applicable in the Federal courts, as former Rule 77 authorized the master to examine the parties. *Jenkins v. Greenwald*, 1 *Bond*, 126; *Fed. Cases*, 7,270; 13 *Fed. Cases*, 552.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, the object of former Rule 77 was to obviate the necessity of providing specially in each case for the examination of parties before the master. *Foot v. Silsby*, 3 *Blatchf.* 507; *Fed. Cases*, 4,920.

The plaintiff might call and examine the defendant before the master. *Ib.*

Held, Rule 77 gave no right to defendants to be sworn and examined as witnesses upon their own application against the objections of the opposing party. The party defendant could not be called by the master for the purpose of giving testimony in his own behalf.

Under sec. 858, *Rev. Stats.*, as amended by Act June 29, 1906, c. 3608, 34 *Stat.* 618 (*U. S. Comp. Stats. Supp.* 1909, p. 242) which prescribes that in civil suits in the Federal courts the competency of a witness shall be determined by the laws of the State where the action is brought, where by the laws of such State a witness may not testify concerning transactions for communications between the witness and a deceased person, such prohibition will be enforced in a suit in the Federal court. *Rowland v. Biesecker*, 185 *Fed. R.* 515, 107 *C. C. A.* 615.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, under Equity Rule 62 taking depositions before an examiner in an equity suit is not a part of a judicial trial and the public have not a right to be present as spectators. *United States v. United Shoe, etc., Co.*, 198 *Fed. R.* 870-875.

Until a deposition has been presented to court neither party has a right to be heard upon the competency, materiality or relevancy of the testimony. *Ib.*

The master in his discretion may take testimony outside of the district of his appointment. *Consolidated Fastner v. Columbia B. & F. Co.*, 85 *Fed. R.* 54.

RULE LXIII—*Form of Accounts Before Master*

All parties accounting before a master shall bring in their respective accounts in the form of debtor and creditor; and

any of the other parties who shall not be satisfied with the account so brought in shall be at liberty to examine the accounting party *viva voce*, or upon interrogatories, as the master shall direct.

Same as Rule 79 of the Rules adopted March 2, 1842.

Decisions

The Rule is almost a copy of Rule 61 of English chancery practice adopted in 1828 which required the accounting party to state his account in the form of debit and credit, which being verified by the party stands as a basis, in which the other party must show error. The old mode of taking accounts by proving every item was abrogated by former Rule 79. *Pulliam v. Pulliam*, 10 *Fed. R.* 23-31.

Whether the rule applicable to require sworn statements of account upon reference to a master for an accounting in an infringement suit not decided, but mandamus granted to present the question by petition to the District Court. *Re Bechworth*, 201 *Fed. R.* 518, 119 *C. C. A.* 614.

The facts in this case were upon refusal of a witness to submit sworn statements of account in response to a summons issued by the master upon a reference, and motion to quash the summons; the master denied the motion to quash and certified to the District Court the question of enforcement of his order as for contempt. The District Court held old Rule 79 inapplicable and directed the summons be quashed. *Held* the ruling withheld submission of statements of the account and was error. *Ib.*

RULE LXIV—*Former Depositions, etc., May Be Used Before Master*

All affidavits, depositions and documents which have been previously made, read, or used in the court upon any proceeding in any cause or matter may be used before the master.

Same as Rule 80 of the Rules adopted March 2, 1842.

RULE LXV—*Claimants Before Master Examinable by Him*

The master shall be at liberty to examine any creditor or other person coming in to claim before him, either upon written interrogatories or *viva voce*, or in both modes, as the nature of the case may appear to him to require. The evidence upon such examinations shall be taken down by the master, or by some other person by his order and in his

presence, if either party requires it, in order that the same may be used by the court if necessary.

Same as Rule 81 of the Rules adopted March 2, 1842.

RULE LXVI—*Return of Master's Report—Exceptions—Hearing*

The master, as soon as his report is ready, shall return the same into the clerk's office and the day of the return shall be entered by the clerk in the Equity Docket. The parties shall have twenty days from the time of the filing of the report to file exceptions thereto, and if no exceptions are within that period filed by either party, the report shall stand confirmed. If exceptions are filed, they shall stand for hearing before the court, if then in session, or, if not, at the next sitting held thereafter, by adjournment or otherwise.

Amendment of Rule 83 of the Rules adopted March 2, 1842.

Decisions

In the discretion of the court, leave may be granted to file exceptions to the master's report after the time limited has expired. *Hatch v. Indianapolis & S. R. Co.*, 9 *Fed. R.* 856-860.

Upon exceptions to the master's report all previous interlocutory orders are open to revision and the court may change its opinion previously expressed and dismiss the bill. *Fourniquet v. Perkins*, 16 *How.* 82-86, 14 *L. ed.* 854.

The exceptions to the report need not be formally overruled or allowed, where the final decree makes plain which are allowed and which disallowed. *Oliver v. Piatt*, 3 *How.* 333-412, 11 *L. ed.* 622.

An assignment of error to the decree, gives the right to a hearing in the appellate court upon an error well assigned, although no exception was filed to the master's report. *Cable v. U. S. Life Ins. Co.*, 111 *Fed. R.* 19-26, 49 *C. C. A.* 216.

Where no exceptions are filed to a master's report the court can consider errors which appear on its face. *Himley v. Rose*, 5 *Cranch*, 313-316, 3 *L. ed.* 111.

Immaterial errors are no ground for setting aside or recommitting the master's report. *Mason v. Crosby*, 3 *Woodb. & M.* 258; *Fed. Cases*, 9,236.

The office of the master is somewhat like that of a jury in courts of law. When the master has once decided matters of fact and no legal question is involved in them, his report should stand, unless reasons exist as strong as would justify setting aside a verdict. *Ib.*

A clear mistake, or a palpable abuse of power, should be corrected. But the court will not retry and re-examine questions of fact raised before the master. *Ib.*

Strictly, in chancery practice, no exceptions to a master's report can be made which are not taken before the master. *Story v. Livingston*, 13 *Pet.* 359-366, 10 L. ed. 200.

Unless the court see reason to be dissatisfied with the report and refer it to the master to review, with liberty to the party to take objection to it. *Ib.* 366.

Exceptions to a master's report are not in the nature of a special demurrer. *Ib.*

All that is necessary is that the exception shall distinctly point out the finding and conclusion of the master which it seeks to reverse. Having done so it brings up for examination all questions of fact and of law arising upon the report relative to that subject. *Foster v. Goddard*, 1 *Black*, 506-509, 17 L. ed. 228.

Where the exceptions are vague and general, and require of the court the performance of duties which belong to the master and counsel, they may be overruled. *Stanton v. Alabama & C. R. Co.*, 2 *Woods*, 506; *Fed. Cases*, 13,296.

General allegations of error in the report without pointing out the particulars are clearly insufficient. *Green v. Bishop*, 1 *Cliff.* 186; *Fed. Cases*, 5,763.

The court will not perform the work which a master should do, but may, if it is shown to be erroneous, refer it back to rectify any mistake. *Chandler v. Pomroy*, 87 *Fed. R.* 262-267.

Every presumption is in favor of the correctness of the master's decision on questions of fact. *Ib.* 266.

Where the reference does not require the testimony reported, in the absence of the master's certificate that all the evidence taken was reported, his conclusion cannot be impeached. *Sheffield & B. C. I. & R. Co. v. Gordon*, 151 *U. S.* 285-293, 38 L. ed. 167, Oct. T., 1893.

Exceptions to the report of a master should point out specifically the errors relied upon, to apprise the opposite party, and that the master may have an opportunity to correct his errors or reconsider his opinion. *Ib.* 290.

In passing on exceptions to a master's report, the exceptions thereto are to be regarded so far only as they are supported by the statements of the master, or by evidence brought to the attention of the court by particular reference in the exceptions. *Harding v. Handy*, 11 *Wheat.* 103-126, 6 L. ed. 429.

Such testimony need not be reported farther than it is relied on to support, explain, or oppose particular exceptions. *Ib.* 127.

The presumptions are in favor of the master's report upon matters of fact. Yet if it cannot stand scrutiny upon argument it is entitled to revision by the court. *Webb v. Powers*, 2 *Woodb. & M.* 497; *Fed. Cases*, 17,323.

In the absence of exceptions there can be no inquiry into the correctness of the findings of fact in the master's report; but the master's mistaken apprehensions of the legal consequences of the fact reported may be considered without exceptions. *Burke v. Davis*, 81 *Fed. R.* 907-910, 26 *C. C. A.* 675.

The findings of the master are not absolutely binding upon the court, yet they will not be set aside or modified in the absence of some clear error or mistake. *Camden v. Stuart*, 144 *U. S.* 104-118, 36 L. ed. 363.

Where a cause was referred to a master to take the testimony and report his findings of fact and conclusions of law thereon, unless some obvious error has intervened in the application of the law or some serious mistake has been made in the consideration of the evidence, a decree in accordance with his findings should be permitted to stand. *Crawford v. Neal*, 144 *U. S.* 585-596, 36 L. ed. 552.

But not where such reference has been made without the agreement of both parties. *Bosworth v. Hook*, 77 *Fed. R.* 686-687, 23 *C. C. A.* 404.

When a reference of the law and facts is made upon motion of one of the parties, the master's finding has not the force of a verdict or the report of a referee, and on exceptions thereto, the court must determine by its own judgment the issue presented. *Ib.*

Where the parties have stipulated that the master who takes the proofs may report the same "with his findings of fact and conclusions of law thereon," his findings are conclusive and binding upon the court, so far as they are based upon conflicting evidence, or the veracity of witnesses, or so far as there is evidence consistent with his findings. *U. S. Trust Co. v. Mercantile Trust Co.*, 88 *Fed. R.* 140-153, 31 *C. C. A.* 427.

As the case was referred to a master to report not the evidence merely, but the facts of the case and his conclusions of law thereon, we think his

finding, so far as it involves questions of fact, is attended by a presumption of correctness similar to that in the case of a finding by a referee, the special verdict of a jury, the finding of a Circuit Court under sec. 649, *Rev. Stats. (U. S. Comp. Stats. 1901, p. 525)*, or in an admiralty case appealed to this court. In neither of these cases is the finding absolutely conclusive, as if there be no testimony tending to support it; but so far as it depends on conflicting testimony, or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable. *Davis v. Schwartz*, 155 *U. S.* 631-636, 39 *L. ed.* 293, Oct. T., 1894.

The conclusions of the master, depending upon the weighing of conflicting testimony, have every reasonable presumption in their favor, and are not to be set aside nor modified unless there clearly appears to have been error or mistake upon his part. *Tilghman v. Proctor*, 125 *U. S.* 136, 31 *L. ed.* 668.

Where by consent a cause is referred to a master to make findings of fact and conclusions of law, exceptions to his findings of fact should be first submitted to the master for his consideration and action so that he may know in what particulars his report is objectionable and be enabled to reconsider his opinion and correct his errors. *McNamara v. Home L. & C. Co.*, 105 *Fed. R.* 202-204.

Where reference has been had upon both fact and law a party may file exceptions to the master's report as to the conclusions of law after the report has been filed in court. *Home L. & C. Co. v. McNamara*, 111 *Fed. R.* 822-827, 49 *C. C. A.* 642.

Where the master submitted a draft report to counsel of the respective parties, exceptions to such report are not waived by failure to file the same with the master, but exceptions to the principal finding may be filed in the court. *Jennings v. Dolan*, 29 *Fed. R.* 861-862.

It is not necessary that exceptions should specifically point out the unconstitutionality of an act under which the master has given priority to certain claims. *Fidelity Ins. & S. D. Co. v. Shenandoah Iron Co.*, 42 *Fed. R.* 372-374.

RULE LXVII—*Costs on exceptions to master's report*

In order to prevent exceptions to reports from being filed for frivolous causes, or for mere delay, the party whose exceptions are overruled, shall, for every exception overruled, pay five dollars costs to the other party, and for every exception allowed shall be entitled to the same costs.

An amendment of Rule 84 of the Rules adopted March 2, 1842.

Decisions

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, solicitor's fees were not included in the term "costs" under this rule. *Garretson v. Clark*, 17 *Blatchf.* 256, *Fed. Cases*, 5,249.

RULE LXVIII—Appointment and Compensation of Masters

The District Courts may appoint standing masters in chancery in their respective districts (a majority of all the judges thereof concurring in the appointment), and they may also appoint a master *pro hac vice* in any particular case. The compensation to be allowed to every master shall be fixed by the District Court, in its discretion, having regard to all the circumstances thereof, and the compensation shall be charged upon and borne by such of the parties in the cause as the court shall direct. The master shall not retain his report as security for his compensation; but when the compensation is allowed by the court, he shall be entitled to an attachment for the amount against the party who is ordered to pay the same, if, upon notice thereof, he does not pay it within the time prescribed by the court.

Substantially the same as Rule 82 of the Rules adopted March 2, 1842.

Statutory Provisions

No clerk of the District or Circuit Courts of the United States or their deputies shall be appointed a receiver, or a master in any case, except where the judge of said court shall determine that special reasons exist therefor, to be assigned in the order of appointment. Act of Mar. 3, 1879, ch. 183, 20 *Stat. L.* 415 (*U. S. Comp. Stats. Supp.* 1911, p. 128, sec. 68, Judicial Code), Act March 3, 1911, ch. 231, 36 *Stat. L.* 231.

Sec. 982, *Rev. Stats.* (*U. S. Comp. Stats.* 1901, p. 706). If any attorney, proctor, or other person admitted to conduct causes in any court of the United States, or of any territory, appears to have multiplied the proceedings in any cause before such court, so as to increase the costs unreasonably and vexatiously, he shall be required by order of the court to satisfy the excess of costs so increased.

Decisions

It is a matter of discretion whether the examiners shall be special or standing examiners. *Van Hook v. Pendleton*, 2 *Blatchf.* 85; *Fed. Cases*, 16,852.

A master being an officer of the court should be selected and appointed by the court. Courts ought not to regard arrangements

between counsel as to the appointment and compensation of the master.

The compensation of the master should be measured by the amount of work and time required and the responsibility assumed, with due regard to the magnitude of the interests involved. Such compensation should be reasonable but not exorbitant. *Finance Committee v. Warren*, 82 *Fed. R.* 525-527, 27 *C. C. A.* 472.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, former Equity Rule 82 required a master to file his report whether his fees were paid or not, and provided for an attachment to compel payment. *Frese v. Biedenfeld*, 14 *Blatchf.* 402; *Fed. Cases*, 5,111.

There is no rule requiring an examiner to file testimony taken by him without payment of his fees. *Ib.*

The provisions in a decree for payment to a master of his fees are not subject to be stayed by proceedings for appeal. *Myers v. Dunbar*, 12 *Blatchf.* 380; *Fed. Cases*, 9,990.

The master is not a party to the suit, and the provision in the rule for his payment is not subject to be stayed by proceedings which stay the execution of the decree *inter partes*. *Ib.*

While the defendants would not be able to recover any moneys paid the master, if successful on appeal, it will be competent for the court on reversal of its decree to regard the amount paid to the master, as part of the costs to be recovered from the opposite party. *Ib.*

Motion to require security for costs is in order at any time, if a non-resident is the plaintiff or if extra costs grow out of an order of reference when not contemplated. *Huganin v. Thatcher*, 18 *Fed. R.* 105.

The fee allowed for each adjournment should be paid by the party asking for the adjournment. *Brickill v. The Mayor, etc.*, 55 *Fed. R.* 565.

Special services should be compensated by a special allowance. *Erie Ry. Co. v. Heath*, 10 *Blatchf.* 214; *Fed. Cases*, 4,516.

A stipulation of counsel to increase the fees allowed the special master above those allowed by the rules of the trial court was disapproved. The receipt of such additional compensation without the sanction of the court is wrong. *Re Berkeley*, 203 *Fed. R.* 7-12.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, in ordinary cases of no special difficulty or labor the master under former Rule 82 should be allowed the compensation allowed by the State law to a referee, which in New York is \$3.00 a day,

this being adopted as a general rule, although former Rule 82 left fees in the discretion of the court. *Doughty v. West B. & C. Mfg. Co.*, 8 *Blatchf.* 107; *Fed. Cases*, 4,030.

The docket fee allowed by the Act of Feb. 26, 1853, is allowed upon a reference to a master. The hearing before a master is neither "a trial" nor a "final hearing." *Ib.*

The clerk has no power to fix the compensation to be allowed. *Ib.*

Sec. 982, *Rev. Stats.* (*U. S. Comp. Stats.* 1901, p. 706) only permits the court to order that an attorney who has unnecessarily increased the costs shall personally pay the excess of such costs over the amount which was properly incurred. Its purpose is to punish the attorney who vexatiously increases costs. *Motion Picture Patents Co. v. Steiner*, 201 *Fed. R.* 63, 119 *C. C. A.* 401.

So much of a decree dismissing a bill as awarded an extra allowance as costs is appealable where the contention is that there is no law permitting such an award. *Ib.*

In a suit to recover damages under the act to regulate commerce approved February 4, 1887, 24 *Stat.* 379, c. 104 (*U. S. Comp. Stats.* 1901, p. 3154) where the unliquidated damages were over \$2,000 but the jury awarded less than \$500, *Held* an allowance for attorney's fees taxed as costs was error. The court in such case has power only to entertain and decide the case, but it is forbidden to allow costs (by sec. 968, *Rev. Stats.*, *U. S. Comp. Stats.* 1901, p. 702). *Delaware, L. & W. R. Co. v. Lyne*, 193 *Fed. R.* 984, 113 *C. C. A.* 604.

If the risk of losing costs is to be avoided in suits under the interstate commerce act involving small amounts, the action should be brought in the appropriate State court. *Ib.*, p. 606.

An order appointing a standing master need not be recorded and is not open to collateral attack on the ground that one is indispensable. *Seaman v. Northwestern M. L. Ins. Co.*, 86 *Fed. R.* 493-497, 30 *C. C. A.* 212.

The parties may assent to the appointment of a deputy clerk as master and this consent need not be specified in the decree. *Fischer v. Hayes*, 22 *Fed. R.* 92-93.

To the same effect *Briggs v. Neal*, 120 *Fed. R.* 224, 56 *C. C. A.* 578.

Though the appointment of clerks or other deputies is forbidden by the Act of Mar. 3, 1879, 20 *Stat. L.* 415, except when the judge shall determine that special reason exists therefor, to be assigned in the order of appointment, the omission of the judge to assign such reason in the order is not reversible error, where the opinion states a special reason for the appointment. *Briggs v. Neal*, 120 *Fed. R.* 224-227, 56 *C. C. A.* 578.

RULE LXIX—*Petition for Rehearing*

Every petition for a rehearing shall contain the special matter or cause on which such rehearing is applied for, shall be signed by counsel, and the facts therein stated, if not apparent on the record, shall be verified by the oath of the party or by some other person. No rehearing shall be granted after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the Circuit Court of Appeals or the Supreme Court. But if no appeal lies, the petition may be admitted at any time before the end of the next term of the court, in the discretion of the court.

An amendment of Rule 88 of the Rules adopted March 2, 1842.

Decisions

If a petition for rehearing is presented, a motion therefor made in season and entertained by the court, the time limited for a writ of error or appeal does not begin to run until the petition or motion is disposed of. *Aspen M. & S. Co. v. Billings*, 150 *U. S.* 31-36, 37 L. ed. 988, Oct. T., 1893.

In such case although the decree may be entered in form, such entry does not discharge the parties from attendance in the cause; they are bound to follow the petition for rehearing until disposed of. *Ib.* 36.

The rule construed to mean that application must be made for rehearing during the term, which being entertained the decree is thereby prevented from passing beyond the control of the court, which may grant or deny the rehearing after the term. *Ib.* 37.

Rehearings after a decree are not a matter of right, but rest in the sound discretion of the court. *Daniel v. Mitchell*, 1 *Story*, 198; *Fed. Cases*, 3,563.

Where petitioned for on the ground of newly-discovered evidence they are governed by the same consideration as cases where leave is asked to file a bill of review after a decree, upon like ground. *Ib.*

A mistake of law by counsel, as to the pertinency or force of the evidence, is not ground for rehearing. *Baker v. Whiting*, 1 *Story*, 218; *Fed. Cases*, 786.

A rehearing will not be granted on the ground of new evidence, where the party could by reasonable inquiry and diligence have obtained it before the final hearing. *Ib.*

Where rehearing on the ground of newly-discovered evidence is granted it will be upon the filing of a supplemental bill. *Ib.*

The burden is upon the applicant to show that the omission to produce the testimony was not due to negligence, and that he could not by proper diligence and inquiry have obtained knowledge of its existence before the decree. *Gillette v. Bate Refrigerating Co.*, 12 *Fed. R.* 108-110.

The facts and circumstances must be set out so that the court can draw its own conclusions. *Ib.*

That testimony fully considered is applied in an argument to one point, and by the court applied to another, is not ground for a rehearing. *Hunter v. Marlboro*, 2 *Woodb. & M.* 168; *Fed. Cases*, 6,908.

An application for a rehearing must usually state some reason that would constitute good ground for a new trial at common law. *Ib.*

It is not ground for a new hearing that some of the evidence is not referred to in the opinion of the court, if it was argued by counsel and considered by the court. *Bently v. Phelps*, 3 *Woodb. & M.* 403; *Fed. Cases*, 1,332.

Rehearings in equity are only allowed where some plain, obvious, and palpable error or omissions, or mistake has been made, or where something material to the decree is brought to the notice of the court which has before escaped its attention. *Jenkins v. Eldredge*, 3 *Story*, 299; *Fed. Cases*, 7,267.

A rehearing will not be granted upon a certificate of counsel stating errors of law generally, and not pointing out any specific mistake, except that the court came to a wrong conclusion. *Tufts v. Tufts*, 3 *Woodb. & M.* 426; *Fed. Cases*, 14,232.

If the affidavits filed in support of the motion show that the newly-discovered evidence is merely cumulative, a rehearing will be denied. *Rogers v. Marshall*, 13 *Fed. R.* 59.

Where the newly-discovered evidence would not have varied the decree, a rehearing will be denied. *Adair v. Thayer*, 7 *Fed. R.* 920.

To grant a new hearing on newly-discovered evidence, the evidence offered should of itself be such as to make it probable that its introduction would change the result. *Munson v. The Mayor*, 11 *Fed. R.* 72-73.

Final decrees may be modified upon motion during the terms at which they are rendered. *Railroad Co. v. Mayor*, 7 *Wall.* 575, 19 L. ed. 275.

The provisions of the Rule are more liberal than the practice which preceded it, but the Supreme Court did not mean to adopt the English

practice on the subject. *Emerson v. Davies*, 1 *Woodb. & M.* 21; *Fed. Cases*, 4,437.

If the petition for rehearing be filed during the term, the court retains jurisdiction over the case and may subsequently decide upon the application. *Giant Powder Co. v. California V. P. Co.*, 5 *Fed. R.* 197-202.

The petition is not an *ex parte* proceeding. It can only be presented on notice, and only considered after the other side have had an opportunity to answer it. *Ib.* 199.

The practice in this country is essentially different from the old practice in the English courts, where on petition, approved by the certificate of two counsel, leave was granted almost as a matter of course. *Ib.* 200.

The decisions of the courts of England and of the American States have no force in the Federal court upon the question, since the Rule is imperative. *Scott v. Hore*, 1 *Hughes*, 163; *Fed. Cases*, 12,535.

A decree rendered by default, because of the neglect of counsel cannot be opened on a motion for rehearing. *Ib.*

Where no appeal lies, a rehearing may be granted if filed before the end of the next term after the final decree. *Clarke v. Threlkeld*, 2 *Cranch C. C.* 408; *Fed. Cases*, 2,865.

An exception to the general rule that the jurisdiction of the court over its decrees terminates with the close of the term at which they were rendered, is made by the Rule in cases where no appeal lies. *Mcelle v. Sherwood*, 148 *U. S.* 21-26.

The effect of the Rule is to deprive the court of the power to grant a rehearing after the lapse of the term next succeeding the entry of the final decree. *Glenn v. Dimmock*, 43 *Fed. R.* 550-551.

A party taking a lease from a receiver must be deemed to have knowledge that the court has full power to vacate any decree it has made during the term at which it was rendered. *Henderson v. Carbondale Coal & C. Co.*, 140 *U. S.* 25-40, 35 *L. ed.* 332.

The application for rehearing must be made to the court which rendered the decree. An appellate court cannot on motion set aside the decree of the court below and grant a rehearing. *Roemar v. Simon*, 91 *U. S.* 149, 23 *L. ed.* 267.

The application to the court below cannot be made after the term at which the decree was rendered. *Ib.* 150.

The granting or refusing a rehearing rests in the sound discretion of the court rendering the decree and furnishes no ground for an appeal. *Buffington v. Harvey*, 95 *U. S.* 99-100, 24 *L. ed.* 381.

Where it is the practice to keep the term of court open until the statutory time has arrived to open the next term, a petition for rehearing, filed before the term at which the decree was rendered has been adjourned "*sine die*," is within the time prescribed by the Rule. *First National Bank v. Woodrum*, 86 *Fed. R.* 1004-1005.

A motion to reopen the decree and take further evidence and reargue the case is not a motion for a rehearing, and, therefore, is not governed by the strict rules which apply to rehearings, technically so called, but is rather a motion addressed to the discretion of the court with reference to the order of trial. So held in a suit for infringement of patent where a decree for injunction and an account had been rendered. *Campbell, P. P. & Mfg. Co. v. Marden*, 70 *Fed. R.* 339-340.

Where a decree dismissing a bill for infringement of patent is reversed, and on the mandate a decree for an accounting is made thereafter by the lower court, that court may afterwards allow amendments to the pleadings and grant a rehearing for the introduction of newly-discovered evidence. *C. A. Potts & Co. v. Creager*, 71 *Fed. R.* 574-576.

The Rule concerns only petitions for rehearing filed prior to the taking of an appeal; it does not apply to the filing of a supplemental bill in the nature of a bill of review. *In re Gamewell Fire A. Telegraph Co.*, 73 *Fed. R.* 908-910, 20 *C. C. A.* 111.

When a decree of the Circuit (District) Court has been decided on appeal, that court cannot vary the decree rendered in the appellate court, nor examine it for any other purpose than execution, nor give any other or further relief, nor review it even for apparent error upon any matter decided on appeal. *In re Sandford Fork and Tool Co.*, 160 *U. S.* 247-255, 40 *L. ed.* 414.

But the Circuit (District) Court may consider and decide any matters left open by the mandate of the appellate court, and its decisions of such matters may be reviewed by a new appeal. *Ib.* 256.

A decree entered on report of a master fixing the amount and priority of claims against an insolvent corporation and ordering a distribution of a fund, is a final decree, from which an appeal lies, and, under former Rule 88 a petition for rehearing could not be entertained by the Circuit Court after the term at which the decree was entered, although a portion of the fund ordered to be distributed was still in the registry of the court. *Halstead v. Forest Hill Co.*, 109 *Fed. R.* 820-822.

To the same effect, *Hoffman v. Knox*, 50 *Fed. R.* 484-489, 1 *C. C. A.* 535.

Where an appellate court gives permission to apply to the trial court to file a bill of review it may pass upon the questions, and determine the parties' right to file a bill of review, or it may grant permission and leave the trial court to pass upon its duty to give or refuse leave to file the bill. *Board of Councilmen v. Deposit Bank*, 120 *Fed. R.* 165-172.

The proper remedy where the court strikes out claims under sec. 57*g* of the Bankruptcy Act of 1898 is by appeal, and not a petition for revision. *In re Dickson*, 111 *Fed. R.* 726-729, 49 *C. C. A.* 574.

RULE LXX—*Suits by or Against Incompetents*

Guardians *ad litem* to defend a suit may be appointed by the court, or by any judge thereof, for infants or other persons who are under guardianship, or otherwise incapable of suing for themselves. All infants and other persons so incapable may sue by their guardians, if any, or by their *prochein ami*; subject, however, to such orders as the court or judge may direct for the protection of infants and other persons.

Same as Rule 87 of the Rules adopted March 2, 1842.

Decisions

A decree against a woman shown by the bill to be both a minor and *feme covert* will be reversed where no appearance by or for her was entered, and no guardian *ad litem* was appointed. *O'Hara v. MacConnell*, 93 *U. S.* 150-152, 23 *L. ed.* 842.

The duty of watching over the interests of infants devolves in great measure upon the court. While not reversible error, it excites attention where the record shows infants had parents and a stranger is appointed guardian *ad litem*. *Bank v. Ritchie*, 8 *Pet.* 128-144, 8 *L. ed.* 890.

Such guardian may not be appointed without bringing the minors into court or issuing a commission for the purpose. The adversary counsel should not be allowed to name the guardian. *Ib.* 144.

Even if the answer of the guardian consents to the decree, the court should satisfy itself as to the facts. *Ib.* 144.

A decree against an infant made by consent of counsel though unusual, if made without fraud or collusion is binding upon the infant, and cannot be set aside by rehearing, appeal, or review, the infant being usually bound by acts done in good faith by his solicitor or counsel in the course of the suit, to the same extent as a person of full age. *Thompson v. Maxwell Land Grant Co.*, 168 *U. S.* 451-463, 42 *L. ed.* 539.

Where infants answer by a guardian *ad litem* submitting their rights to the protection of the court, it is the court's duty to give the minors the benefit of the statute of limitations. *White v. Miller*, 158 *U. S.* 128-146, 39 L. ed. 927, Oct. T., 1894.

In State courts the usual practice is to bring in non-resident minors by appointment of a guardian *ad litem*, and thus subject them to a decree for sale or partition of lands. *Manson v. Dancanson*, 166 *U. S.* 540, 41 L. ed. 1108.

Federal courts can only appoint guardians *ad litem* for infants where property of an infant is involved in legal proceedings before them. *N. Y. Life Ins. Co. v. Bangs*, 103 *U. S.* 435, 26 L. ed. 582.

A State statute directing the guardian to appear and defend does not do away with the necessity of personal service of process on the infant where a personal contract or right of an infant is being litigated. *Ib.*

RULE LXXI—*Form of Decree*

In drawing up decrees and orders, neither the bill, nor answer, nor other pleadings, nor any part thereof, nor the report of any master, nor any other prior proceeding, shall be recited or stated in the decree or order; but the decree and order shall begin, in substance, as follows: "This cause came on to be heard (or to be further heard, as the case may be) at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz:" (Here insert the decree or order.)

Same as Rule 86 of the Rules adopted March 2, 1842.

Decisions

Held, it is proper for the court to announce in an interlocutory decree the opinion it has formed as to the rights of the parties, and await a master's report upon matters of account before final decree. *Forgay v. Conrad*, 6 *How.* 201-206, 12 L. ed. 404.

Under the Rule the decree may state conclusions of fact as well as of law and often does so. *Putnam v. Day*, 22 *Wall.* 60-67, 22 L. ed. 764.

Under the English practice the decree always recites the substance of the bill and answer and pleadings; but under the rules prescribed by the Supreme Court, the decree does not, and generally does not recite the facts on which the decree is founded. *Whiting v. The Bank*, 13 *Pet.* 6-13.

This difference is important to note in applying the rule that no bill of review lies for errors of law, except where such errors are apparent on the face of the decree. In America the error must be apparent on the record, which includes the bill, answer, and other pleadings, together with the decree. *Ib.* 14.

The bill, answer, and other pleadings, together with the decree, constitute the record of the case. *Ib.*

Adverse interests as between codefendants may be passed upon and decided, and if the parties have had a hearing and an opportunity of asserting their rights, they are concluded by the decree as far as it affects rights presented to the court, and passed upon by its decree. *Corcoran v. Chesapeake, etc., Canal Co.*, 94 *U. S.* 741-744, 24 L. ed. 190.

When asked in a subsequent bill to enforce a prior decree obtained by consent, the court has a right to decline to treat such consent decree as *res adjudicata*. *Lawrence Mfg. Co. v. Janesville Mills*, 138 *U. S.* 552-562, 34 L. ed. 1005.

A decree which passes upon questions not at issue, rendered against a party who takes no actual part in the litigation subsequent to filing an answer is void and may be contested collaterally. *Hovey v. Elliott*, 167 *U. S.* 409-445, 42 L. ed. 215, citing *Reynolds v. Stockton*, 140 *U. S.* 254, 35 L. ed. 464.

A decree of foreclosure and sale is not final for an appeal where the amount due upon the debt remains to be determined. *Railroad Co. v. Swasey*, 23 *Wall.* 405-410, 23 L. ed. 136.

A final decree is one which determines the principal matters in controversy. *Dean v. Nelson*, 7 *Wall.* 342, 19 L. ed. 94, and cases cited.

Injunctive decrees are not absolutely final until the end of the term: until then they may be modified on motion. *Railroad v. Mayor*, 7 *Wall.* 575, 19 L. ed. 275.

RULE LXXII—*Correction of Clerical Mistakes in Orders and Decrees*

Clerical mistakes in decrees or decretal orders, or errors arising from any accidental slip or omission, may, at any time before the close of the term at which final decree is rendered, be corrected by order of the court or a judge thereof, upon petition, without the form or expense of a rehearing.

An amendment of Rule 85 of the Rules adopted March 2, 1842.

Decisions

A decree is usually considered as final after the end of the term at which it is rendered, when there is no special minute to the contrary. *Jenkins v. Eldridge*, 1 *Woodb. & M.* 61; *Fed. Cases*, 7,269.

Under the early practice decrees were deemed to be enrolled as of the term when rendered. *Whiting v. Bank*, 13 *Pet.* 6-13; *Dexter v. Arnold*, 5 *Mason*, 303; *Fed. Cases*, 3,856.

Where it is apparent that the decree rendered by another judge should have been as petitioner claims, yet as the error may have been judicial and not clerical, that fact will not justify an alteration of the decree after term. *Hicklin v. Marco*, 64 *Fed. R.* 609-610.

It is within the power of the court to correct clerical error in its own decrees at any time, and it may ascertain the existence of alleged errors by any satisfactory evidence, the judge's docket, his recollection, or other evidence. *Ib.* 609.

The court has full power over its decrees to amend, correct, or vacate them during the term at which they are rendered. *Doss v. Tyack*, 14 *How.* 297-313, 14 *L. ed.* 428.

The Circuit (District) Court has no power to set aside its decrees on motion after the term at which they are rendered. *McMicken v. Perin*, 18 *How.* 507-511, 15 *L. ed.* 504.

Although the decree is not according to the bill, it can only be corrected after the term by bill of review. So *Held*, where a decree directed the sale of land not described in the bill. *Robinson v. Rudkins*, 28 *Fed. R.* 8.

That the Circuit (District) Court retains jurisdiction of the cause for the purpose of enforcing all the provisions of its decree rendered, and passing the accounts of and discharging a receiver, does not warrant it to take jurisdiction of a bill of review for apparent errors brought after the time limited by statute for taking an appeal. *Chamberlain v. Peoria, D. & E. R. Co.*, 118 *Fed. R.* 32-34, 55 *C. C. A.* 54.

RULE LXXIII—*Preliminary Injunctions and Temporary Restraining Orders*

No preliminary injunction shall be granted without notice to the opposite party. Nor shall any temporary restraining order be granted without notice to the opposite party, unless it shall clearly appear from specific facts, shown by affidavit

or by the verified bill, that immediate and irreparable loss or damage will result to the applicant before the matter can be heard on notice. In case a temporary restraining order shall be granted without notice, in the contingency specified, the matter shall be made returnable at the earliest possible time, and in no event later than ten days from the date of the order, and shall take precedence of all matters, except older matters of the same character. When the matter comes up for hearing the party who obtained the temporary restraining order shall proceed with his application for a preliminary injunction, and if he does not do so the court shall dissolve his temporary restraining order. Upon two days' notice to the party obtaining such temporary restraining order, the opposite party may appear and move the dissolution or modification of the order, and in that event the court or judge shall proceed to hear and determine the motion as expeditiously as the ends of justice may require. Every temporary restraining order shall be forthwith filed in the clerk's office.

A substitute for Rule 55 of the Rules adopted March 2, 1842

Statutory Provisions

Rev. Stats., sec. 646, *U. S. Comp. Stats.* 1901, p. 523. As also Act of Mar. 3, 1875, ch. 137 (18 *Stat. L.* 471). Re-enacted as sec. 36, Judicial Code. All injunctions had in any suit removed from a State court to the Federal courts shall remain in full force until dissolved or modified by the court into which the suit is removed.

Rev. Stats., sec. 718, *U. S. Comp. Stats.* 1901, p. 580. Re-enacted as sec. 263, Judicial Code. Where notice of motion for an injunction is given and irreparable injury appears imminent if there be delay, the District Court or judge, may grant a temporary restraining order, with or without security, until decision upon a motion for injunction.

Sec. 264, Judicial Code. Writs of injunction may be granted by any justice of the Supreme Court in cases where they might be granted by the Supreme Court; and by any judge of a District Court in cases where they might be granted by such court. But no justice of the Supreme Court shall hear or allow any application for an injunction or restraining order in any cause pending in the circuit to which he is allotted, elsewhere than within such circuit, or at such place outside of the same as the parties may stipulate in writing, except when it cannot be heard by the district judge of the district. In case of the absence from the district of the district judge, or of his disability, any circuit judge of the circuit in which the district is situated may grant an injunction

or restraining order in any case pending in the District Court, where the same might be granted by the district judge.

Sec. 265, Judicial Code. The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy.

Sec. 266, Judicial Code. No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute, shall be issued or granted by any justice of the Supreme Court, or by any District Court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court, or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. Whenever such application as aforesaid is presented to a justice of the Supreme Court, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges: *Provided, however*, that one of such three judges shall be a justice of the Supreme Court, or a circuit judge. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the governor and to the attorney general of the State, and to such other persons as may be defendants in the suit: *Provided*, That if of opinion that irreparable loss or damage would result to the complainant unless a temporary restraining order is granted, any justice of the Supreme Court, or any circuit or district judge, may grant such temporary restraining order at any time before such hearing and determination of the application for an interlocutory injunction, but such temporary restraining order shall remain in force only until the hearing and determination of the application for an interlocutory injunction upon notice as aforesaid. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case.

Sec. 129, Judicial Code. Where upon a hearing in equity in a District Court, or by a judge thereof in vacation, an injunction shall be granted, continued, refused, or dissolved by an interlocutory order or decree, or an application to dissolve an injunction shall be refused, or an interlocutory order or decree shall be made appointing a receiver, an appeal may be taken from such interlocutory order or decree granting, con-

tinuing, refusing, dissolving, or refusing to dissolve, an injunction, or appointing a receiver, to the Circuit Court of Appeals, notwithstanding an appeal in such case might, upon final decree under the statutes regulating the same, be taken directly to the Supreme Court: *Provided*, That the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed unless otherwise ordered by that court, or the appellate court, or a judge thereof, during the pendency of such appeal: *Provided, however*, That the court below may, in its discretion, require as a condition of the appeal an additional bond.

Act Feb. 25, 1885, ch. 149 (23 Stat. L. 321), conferred jurisdiction on the District and Circuit Courts to issue the writ of injunction to prevent illegal inclosures of the public lands.

Act Feb. 4, 1887, ch. 104, sec. 16 (24 Stat. L. 384).] An act to regulate commerce as amended by the Act of Mar. 2, 1889, ch. 382, authorizes the issuance of the writ of injunction to restrain violations of the interstate commerce law.

Act Mar. 3, 1881, ch. 138 (21 Stat. L. 503), sec. 7.] Injunction may issue to restrain infringement of a trade-mark.

Act Mar. 3, 1899, ch. 428 (30 Stat. L. 1151), sec. 12, as amended by the Act of Feb. 20, 1900 (31 Stat. L. 32).] The Secretary of the Navy may enjoin the erection of obstructions in navigable waters and enforce removal of the same.

Decisions

A preliminary injunction will not be granted upon the mere statement of a plaintiff's apprehension. *Jenny v. Crase*, 1 *Cranch C. C.* 443; *Fed. Cases*, 7,285.

No injunction can be granted unless special and sufficient cause is clearly shown. *Perry v. Parker*, 1 *Woodb. & M.* 280; *Fed. Cases*, 11,010.

Injunctions in the Federal courts are special and not as a matter of course. *Ib.*

In patent cases if the title of complainant is denied he must show former recoveries or long possession, to warrant the issuance of an injunction before the disputed questions of title are settled at law. *Ib.*

Under the Act of 1793, injunctions were prohibited in United States courts without notice first to the opposing party. *Perry v. Parker*, 1 *Woodb. & M.* 280; *Fed. Cases*, 11,010; *New York v. Connecticut*, 4 *Dallas*, 1.

The clause of the Act of 1793 prohibiting injunction without notice was repealed by the Act of June 22, 1874, and the act adopting the

Revised Statutes (sec. 5596, *Rev. Stats., U. S. Comp. Stats.* 1901, p. 3750); *Yuengling v. Johnson*, 1 *Hughes*, 607; *Fed. Cases*, 18,195.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, it was not indispensable that a bill for an injunction should contain a prayer for discovery. *Lawrence v. Bowman*, 1 *McAll.* 419; *Fed. Cases*, 8,134.

When on motion for injunction there appears such a repugnancy as to the facts as to make it necessary to decide the relative truth of the conflicting statements of the affidavits filed by either party, or the credibility of the witnesses, the injunction should be refused. *Cooper v. Mathews*, 8 *Law Rep.* 413; *Fed. Cases*, 3,200.

The complainant is not entitled as a matter of right to file further affidavits in answer to those of defendant's; in case of an entire surprise an opportunity may be given for reply. *Day v. Boston Belting Co.*, 16 *Law Rep.* 330; *Fed. Cases*, 3,674, citing *Farmer v. Calvert Litho., etc., Co.*, 1 *Flip.* 228; *Fed. Cases*, 4,651.

In England the practice is to move for an injunction *ex parte* and there is no hearing; then the defendants may move to dissolve the injunction and the parties are heard by the court. *Ib.*

Affidavits may be read in behalf of both parties upon an application for injunction. *Brooks v. Bicknell*, 3 *McLean*, 250; *Fed. Cases*, 1,944.

Affidavits are read to support the injunction on a motion to dissolve it on the coming in of the answer by the well-established practice in England. *Ib.*

The denial of plaintiff's title in an answer does not prevent the court from awarding a temporary injunction. *Clum v. Brewer*, 2 *Curt.* 506; *Fed. Cases*, 2,909.

Where the right to a temporary injunction depends upon the terms of a written instrument, and there are no controverted facts, it is the duty of the court to interpret the instrument and grant or refuse an injunction accordingly. *Ib.*

The practice of allowing complainant to file affidavits in reply to the affidavits of defendant on complainant's motion for an injunction, should not be allowed where it would result in determining a vital question of the cause upon *ex parte* affidavits. *Illingsworth v. Spaulding, J. & Co.*, 9 *Fed. R.* 154-155.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, it was only in the case of the common injunction that the defendant had the right to have the injunction dissolved upon an answer denying the whole equity of the bill. In cases of a special in-

junction, upon the ground of irreparable mischief, the dissolution of the injunction is not of course upon the coming in of an answer denying the whole equity of the bill; and in such case, upon motion to dissolve such an injunction, the plaintiff may be entitled to read affidavits in contradiction to the answer; if not to the whole answer, to many points. *Poor v. Carleton*, 3 *Sum.* 70; *Fed. Cases*, 11,272.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, if the answer neither admitted nor denied the allegations of the bill the allegations of the bill were taken to be true upon a question of dissolution of an injunction. *Young v. Grundy*, 6 *Cr.* 51, 3 *L. ed.* 149.

Complainants insisted that an answer filed before the time required had only the force of an affidavit, *Held*, that the answer filed *instanta* will be given the weight of an answer on motion to grant or continue an injunction. *Brooks v. Bicknell*, 3 *McLean*, 250; *Fed. Cases*, 1,944.

While on the trial, matter of avoidance in an answer responsive to the bill must be proved; on a motion for injunction it is equivalent to the affidavit of the defendant. *Tobin v. Walkinshaw*, 1 *McAll.* 26; *Fed. Cases*, 14,068.

The granting or dissolving of an injunction rests in the sound discretion of the chancellor and on the justice and equity of each particular case. *Tucker v. Carpenter*, *Hempst.* 440; *Fed. Cases*, 14,217.

Even after answer it is in the sound discretion of the court to continue an injunction if justice will be attained by that course. *Nelson v. Robinson*, *Hempst.* 464; *Fed. Cases*, 10,114.

Where there is equity on the face of the bill an injunction will not be dissolved on the answer, unless there is positive denial of all the material facts which form that equity; and a denial on information and belief is not sufficient. *Ib.*

Where the answer denies all material allegations of the bill and there is no proof, or the proof offered leaves the case in doubt as to the equities, an injunction will be denied. *Shoemaker v. National M. Bank*, 1 *Hughes*, 101; *Fed. Cases*, 12,801.

As upon application for a preliminary injunction the court does not settle the rights of the parties the case is heard upon affidavits alone, and neither party has the right of cross-examination. *Day v. Boston Belting Co.*, 16 *Law Rep.* 329; *Fed. Cases*, 3,674.

At the time of granting an order to show cause against a motion for preliminary injunction under sec. 718, *Rev. Stats. (U. S. Comp. Stats.*

1901, p. 580, sec. 263, Judicial Code), the court may grant an immediate restraining order. *Yuengling v. Johnson*, 1 *Hughes*, 607; *Fed. Cases*, 18,195.

Under sec. 4,921, *Rev. Stats. (U. S. Comp. Stats. 1901, p. 3395)*, courts have the same power in patent cases. *Ib.*

It is not a fatal objection to the issuance of the writ of injunction that its use for the purpose sought is novel. *Nashville C. St. L. R. Co. v. McConnell*, 82 *Fed. R.* 65-76.

A bill to enjoin a judgment at law between the same parties is not considered an original bill, and jurisdiction of the Circuit (District) Court does not depend upon the citizenship of the parties, but if other parties are made in the bill and different interests involved the parties must be such as to give the court jurisdiction as in an original bill. *Dunn v. Clark*, 8 *Pet.* 1-3, 8 *L. ed.* 845.

An injunction will not be granted pending a plea to the jurisdiction. *Ewing v. Blight*, 3 *Wall., Jr.*, 139; *Fed. Cases*, 4,590.

If irreparable mischief impends, or there is just ground for suspicion that the plea is merely intended for delay, the court will order an immediate hearing or trial of the plea. *Ib.*

Upon bill filed praying for an injunction, it is the practice of the court to order that nothing be done prejudicial to the rights of the plaintiff until the motion for an injunction may be heard. *Fanshaw v. Tracy*, 4 *Biss.* 490; *Fed. Cases*, 4,643.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, when plea to the jurisdiction was interposed, upon a bill praying for an injunction, the court would direct an immediate argument of the plea, and in case irreparable mischief was alleged and not denied, would issue a temporary injunction. The court may not assume the fact averred in the plea to be true and permit mischief to be wrought because its jurisdiction is questioned. *Fremont v. Merced Mining Co.*, 1 *McAll.* 267; *Fed. Cases*, 5,095.

A case holding that the Federal courts may not grant a temporary injunction except upon reasonable notice. Decided under the Act of Congress of Mar. 2, 1793, on the authority of 4 *Dallas*, 1; *Maury v. Indianapolis & C. R. Co.*, 4 *Biss.* 78; *Fed. Cases*, 9,891.

The notice required (under the Act of 1793, and by general equitable principles) on application for an injunction is designed to enable the defendant to resist the application, and to enable the judge to act upon the motion with a better knowledge of the equitable rights of the parties. *Wilson v. Stolley*, 4 *McLean*, 272; *Fed. Cases*, 17,839.

Upon an application for an injunction, the defendant may show that the bill does not conform to the rules of practice. *Ib.*

Under the Act of Mar. 2, 1793, *Held*, that no fixed rule could be recognized as to what constituted due notice. *Lawrence v. Bowman*, 1 *McAll.* 419; *Fed. Cases*, 8,134.

Under ordinary circumstances one day's notice is too brief. *Ib.*

Each case must be determined in the exercise of a sound discretion. *Ib.*

A restraining order may be issued without notice under sec. 4 of the Anti-Trust Law of July 2, 1890. *United States v. Coal Dealers' Assn.*, 85 *Fed. R.* 252-259.

The general equity practice requires that notice for an application for a temporary restraining order, as well as for an injunction, shall be given, but where the injury is serious, immanent, and irremediable, or where the mere act of giving the notice might itself be productive of the mischief apprehended, the notice will be dispensed with. *Ib.* 259.

On filing a bill for an injunction the time fixed for hearing may not be so far ahead as to embarrass the defendant. Where an unreasonable time has been set for the hearing it is the right of defendant to come in and have the matter disposed of in a reasonable time. *Walworth v. Cook County*, 5 *Biss.* 133; *Fed. Cases*, 17,136.

If an injunction to stay proceedings at law is granted until further answer, it is never dissolved until the answer comes in. *Reed v. Consequa*, 4 *Wash. C. C.* 174; *Fed. Cases*, 11,606.

If the right of complainant to have the injunction issue upon the case as made by his bill is admitted, the motion to dissolve must be considered solely upon questions raised by the answer. *Farmer v. Calvert Litho. Co.*, 1 *Flip.* 228; *Fed. Cases*, 4,651.

No injunction should be granted where the answering affidavits of the defendants raise a reasonable doubt as to the complainant's rights. *Illingsworth v. Spaulding*, 9 *Fed. R.* 154-155.

Where the question of complainant's right is doubtful, a preliminary injunction will be refused until his rights are determined on a final hearing. *Marks v. Corn*, 11 *Fed. R.* 900.

While a decree of the Circuit (District) Court made in pursuance of the mandate of the appellate court stands, such Circuit (District) Court cannot entertain a proceeding to avoid the effect of such decree by enjoining its enforcement. *Central Trust Co. v. Evans*, 73 *Fed. R.* 562-566, 19 *C. C. A.* 563.

An injunction preventing the usual remedies for the enforcement of a decree would amount, *pro tanto*, to the nullification of the decree itself. *Ib.* 566.

As a general rule equity courts will not interfere by injunction with criminal proceedings. *Davis & Farnum Mfg. Co. v. Los Angeles*, 189 *U. S.* 207-217, 47 L. ed. 778.

A Federal court cannot enjoin proceedings in a State court except under the bankruptcy law. *Dial v. Reynolds*, 96 *U. S.* 340-341, 24 L. ed. 644.

It is expressly forbidden by law. Act of Mar. 2, 1793, sec. 5, 1 *Stat. L.* 334; *Rev. Stats.*, sec. 720 (*U. S. Comp. Stats.* 1901, p. 581, sec. 265, Judicial Code). *Haines v. Carpenter*, 91 *U. S.* 254-257, 23 L. ed. 345.

Sec. 720, *Rev. Stats.* (*U. S. Comp. Stats.* 1901, p. 581, sec. 5, Act 1793, sec. 265, Judicial Code) has application only to such proceedings in the State court as have been commenced before the Federal jurisdiction attaches. *Fisk v. Union Pac. R. Co.*, 10 *Blatchf.* 518; *Fed. Cases*, 4,830; *Louisiana L. L. Co. v. Fitzpatrick*, 3 *Woods*, 222; *Fed. Cases*, 8,541.

The restriction on granting an injunction to a State court must be construed as relating to cases instituted therein before the Federal jurisdiction has attached because (1) of sec. 14 of the Act of 1789 (1 *Stat. L.* 83, *Rev. Stats.* 716, *U. S. Comp. Stats.* 1901, p. 580) that "the Federal courts shall have power to issue all writs which may be necessary for the exercise of their respective jurisdictions"; (2) if Federal courts have no power to restrain parties from thereafter instituting suits, their jurisdiction and action would often be defeated after they had obtained jurisdiction of the person and the subject-matter. *Ib.*

Explaining the case of *Live Stock Ass'n v. Crescent City Co.*, *Fed. Cases*, 8,408, where Mr. Justice Bradley refused an injunction to a State court where judgment had been entered and a writ of error granted. *Ib.*

Sec. 720, *Rev. Stats.* (*U. S. Comp. Stats.* 1901, p. 581, sec. 265 of the act to codify the laws approved March 3, 1911), prohibiting injunctions to stay proceedings in a State court has no application when the cause has been removed into the United States court, or where, no suit has been begun in the State court when the injunction is issued. *French v. Hay*, 22 *Wall.* 250-253, 22 L. ed. 858.

Sec. 720, *Rev. Stats.* (sec. 265, Judicial Code, *U. S. Comp. Stats.*, 1901, p. 581), prohibiting the Federal courts from granting an injunction to the State courts to stay proceedings applies to the Supreme Court as well as the Circuit Courts. *Slaughter House Cases*, 10 *Wall.* 273-298, 19 L. ed. 922.

A provisional injunction granted on the filing of the bill falls with the dismissal of the bill, where the bill is dismissed absolutely, but the chancellor may direct a modified dismissal. *Coleman v. Hudson R. B. Co.*, 5 *Blatchf.* 56; *Fed. Cases*, 2,983.

The Acts of Congress of Sept. 24, 1789, 1 *Stat. L.* 85, sec. 23, and Mar. 3, 1803, 2 *Stat. L.* 244, sec. 2, have no application to the provisional writ of injunction or other incidental proceedings in the progress of the cause. *Ib.*

The Circuit (District) Court cannot issue an injunction to prevent a police officer of a city from serving warrants of arrest issued by a State court for violation of city ordinances claimed to be in contravention of the Constitution of the United States. *Teck Wo v. Crowley*, 26 *Fed. R.* 207-210.

Where it would be against public policy the courts may refuse to issue an injunction whatever the pleadings. *Beasley v. Texas & Pacific Ry. Co.*, 191 *U. S.* 492-498, 48 *L. ed.* 274.

A State court of chancery will not interfere with actions pending in the Federal courts. *City Bank v. Skelton*, 2 *Blatchf.* 26; *Fed. Cases*, 2,740.

An injunction is generally a preventive writ, and not an affirmative remedy. It is only used in the latter character to carry into effect the court's decrees as a writ of assistance; therefore a mandatory injunction will not be granted upon motion but only upon final hearing. *McCauley v. Kellogg*, 2 *Woods*, 13; *Fed. Cases*, 8,688.

Disobedience to an injunction is none the less a contempt because done under advice; the question of animus bears only on the extent of punishment. *Atlantic G. P. Co. v. Dittmar P. Mfg. Co.*, 9 *Fed. R.* 316-317.

A motion to dissolve an *ex parte* injunction may be made before answer. *Metropolitan G. & S. Ex. v. Chicago Bd. of Trade*, 15 *Fed. R.* 847-848.

Held, an action brought in a State court to restrain the execution of a judgment might be removed into the Federal court and thereafter prosecuted, if there was the requisite diversity of citizenship under sec. 2 of the Act of Mar. 3, 1875, *Rev. Stats.*, sec. 639 (*U. S. Comp. Stats.* 1901, p. 520), though the purpose of the suit was to procure the issuance of an injunction to restrain the plaintiffs in the judgments rendered in the State court. *Watson v. Bondurant*, 2 *Woods*, 166; *Fed. Cases*, 17,278.

An injunction obtained in a State court before removal of the suit will not be dissolved for irregularities committed in the State court.

The Circuit Court takes the case in the condition it was in, and has no power over what was done before removal. *Smith v. Schwed*, 6 *Fed. R.* 455-456.

The injunction bond taken in the State court comes into the Circuit (District) Court in full force; but the Circuit (District) Court has power to deal with it upon the principles which govern that court the same as if it had been originally taken by its direction. *Russell v. Farley*, 105 *U. S.* 433-437, 26 *L. ed.* 1060.

If no bond is required the court has no power to award damages except by a decree for costs. *Ib.* 437.

The condition of an injunction bond is to answer all damages which the defendant may sustain in consequence of the granting of the injunction. *Bein v. Heath*, 12 *How.* 168-179, 12 *L. ed.* 416.

On such a bond there is no liability for fees paid to counsel for conducting the suit. *Ib.* 179.

A bond with sureties is required or not, as the court in the exercise of a sound discretion may deem the purposes of justice require. *Ib.* 179.

Where an injunction has been dissolved the better practice is for the court to assess the damages, and not compel the injured party to resort to an action at law upon the bond. *Lea v. Deakin*, 13 *Fed. R.* 514-515.

Semble, that where neither the bond given nor any rule prescribes the mode of assessing damages, the court which dissolves the injunction may cause them to be assessed under its direction. *Russell v. Farley*, 105 *U. S.* 433-446, 26 *L. ed.* 1060.

The usual form of an injunction bond in England contains a provision that the party shall abide by such order as the court may make as to damages. *Ib.* 445.

The court may itself decide what damages if any should be given on dissolution. It will never send the bond to another jurisdiction to be sued on and only in an exceptional case refer the matter to a jury. *Coosaw M. Co. v. Farmers' M. Co.*, 51 *Fed. R.* 107.

Where there is equity and the right is clear an injunction should not be refused because the defendant offers to give bond and security to pay any damages found against him. *McWilliams Mfg. Co. v. Blundell*, 11 *Fed. R.* 419-422.

Notice of the injunction must be served upon the parties to be bound by it if they are accessible; if not served and no excuse appears, the injunction as to them is deemed never in force, or waived. *In re Cary*, 10 *Fed. R.* 622-628.

A rule to show cause why an attachment should not issue for breach of an injunction is not the proper practice. There should be motion with notice that defendant stand committed for the breach. *Worcester v. Truman*, 1 *McLean*, 483; *Fed. Cases*, 18,043.

An injunction allowed by the district judge, by the Act of Feb. 13, 1807 (2 *Stat. L.* 418, sec. 719, *Rev. Stats.*, *U. S. Comp. Stats.* 1901, p. 581), expired at the commencement of the term next succeeding the allowance. *Gray v. Chicago, etc., R. Co.*, *Woolw.* 63; *Fed. Cases*, 5,713.

Sec. 717, *Rev. Stats.* (*U. S. Comp. Stats.* 1901, p. 581), referred to writs issued in vacation; by sec. 609, *Rev. Stats.*, the district judge had power to hold the Circuit Court and might issue an injunction as fully as when the circuit justice or judge held the court. The statute meant that application should not be made to the district judge as such, as distinguished from the court, if the court was sitting. *Goodyear D. V. Co. v. Folsom*, 3 *Fed. R.* 509-512.

Where from any cause, as absence or sickness, a party cannot present his application to the circuit or district judge, any justice of the Supreme Court may, anywhere in the United States, hear the application and grant an injunction. *Searles v. J. P. & M. R. Co.*, 2 *Woods*, 621; *Fed. Cases*, 12,586.

The circuit and district judges cannot hear an application for injunction when outside their circuits. *Ib.*

Where the judge of the District Court for the district, and the judge of the Circuit Court for the circuit, and the justice of the Supreme Court allotted to that circuit are all absent from and without the district and circuit, another justice of the Supreme Court has jurisdiction at any place in the United States to hear a motion for an injunction. *United States v. Louisville, etc., C. Co.*, 4 *Dill.* 601; *Fed. Cases*, 15,633.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, a special injunction goes only in those cases in which from their nature the defendants could make no defense. *Boyce's Executors v. Grundy*, 3 *Pet.* 210-219, 7 *L. ed.* 659.

Injunctions may not issue against persons not parties to the suit nor represented therein or in conspiracy with those who are parties. *Scott v. Donald*, 165 *U. S.* 58-117, 41 *L. ed.* 632.

An order refusing a stay of proceedings made in a case other than that in which the stay is operative, amounts to a denial of an injunction under sec. 129, Judicial Code. *Emery v. Central Trust & Safe Deposit Co.*, 204 *Fed.* 965-968.

An order refusing a stay made in a case in which the desired stay would operate does not amount to a denial of an injunction. *Griesa v. Mutual, etc., Co.*, 165 *Fed. R.* 48-50, 91 *C. C. A.* 86.

In a suit for infringement of patent an appeal from an interlocutory decree granting an injunction and referring the cause for an account brings up for review the merits of the cause and if decided in defendant's favor the bill may be dismissed. *Smith v. Vulcan Iron Works*, 165 *U. S.* 518-520, 41 L. ed. 811, Oct. T., 1896.

Under the judicial system before the passage of the Act of Mar. 3, 1891, appeals lay only from final decrees; interlocutory decrees were only reviewable upon an appeal from the final decree. *Held*, the manifest purpose of the Act of 1891 is to allow a review not only of the portion of the decree granting or continuing an injunction, but a review of the whole order or decree. *Ib.* 525.

Before the amendment of the Act of 1891 to include receivers, *Held*, that where the interlocutory order grants an injunction and also appoints a receiver the appeal carries up for review the entire order and the case may on occasion be considered and decided on its merits. *In re Tampa Suburban R. R. Co.*, 168 *U. S.* 583-588, 42 L. ed. 591, Oct. T., 1897.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, an interlocutory decree dissolving an injunction was appealable under the Act of Mar. 3, 1891, ch. 157, sec. 7, creating the Circuit Court of Appeals, as amended by the Act of Feb. 18, 1895, ch. 96 (*U. S. Comp. Stats.* 1901, p. 550). *Chapman v. Yellow Poplar Lumber Co.*, 143 *Fed. R.* 201-204, 74 *C. C. A.* 331.

On an appeal from an interlocutory order the court has power to hear the whole case and dispose of it. *Ib.* 212.

RULE LXXIV—*Injunction Pending Appeal*

When an appeal from a final decree, in an equity suit, granting or dissolving an injunction, is allowed by a justice or a judge who took part in the decision of the cause, he may, in his discretion, at the time of such allowance, make an order suspending, modifying or restoring the injunction during the pendency of the appeal upon such terms, as to bond or otherwise, as he may consider proper for the security of the rights of the opposite party.

An amendment of Rule 93 promulgated January 13, 1879, 97 *U. S.* VII.

Decisions

An appeal taken and perfected from a decree granting, refusing or dissolving an injunction does not disturb its operative effect. *Knox Co. v. Harshman*, 132 *U. S.* 14-16, 33 L. ed. 249.

An appellant from a decree granting an injunction is not entitled as a matter of right to a supersedeas on filing a bond pending the appeal. *Held*, sec. 7 of the Act of 1891 did not abridge the discretion of the Circuit Court to grant or refuse a supersedeas. *In re Haberman Mfg. Co.*, 147 *U. S.* 525-530, 37 L. ed. 266, Oct. T., 1892.

In the Circuit (District) Courts of the United States an appeal giving security when required, generally suspends further proceedings and operates as a supersedeas of execution; but neither a decree for an injunction, nor a decree dissolving an injunction is suspended by an appeal, or writ of error, although all the requisites for a supersedeas have been complied with. *Hovey v. McDonald*, 109 *U. S.* 150-161, 27 L. ed. 888.

The trial court in an equity cause if the purposes of justice require it, has the power after a decree dissolving an injunction, to order a continuance of the *status quo* until a decision can be made by an appellate court, or until the trial court orders the contrary. This power should be exercised when any irremediable injury may result from the effect of the decree rendered and it is discretionary and not appealable.

In recognition of this power and to facilitate its proper exercise former Rule 93 was adopted. *Ib.*

Failure to appeal from an interlocutory order in a cause dissolving an injunction does not deprive the party on an appeal from a final decree of the right to a review of other matters determined than the dissolution of the injunction. *Chapman v. Yellow Poplar Lumber Co.*, 143 *Fed. R.* 201-204, 74 *C. C. A.* 331.

Held, the amount of the bond required on appeal and an interlocutory order granting an injunction under the Act of June 6, 1900 (ch. 803, 31 *Stat. L.* 660) rested in the discretion of the trial court. Upon an appeal from an interlocutory decree granting an injunction, in the absence of an order in the trial court staying the proceedings, the cause in the court below for all purposes, except a review of the injunction, is unaffected by the appeal. *Crown Cork & Seal Co. v. Standard Stopper Co.*, 136 *Fed. R.* 184, 69 *C. C. A.* 200-519.

In an appeal taken under the Act of June 6, 1900, 31 *Stat. L.* 660, ch. 803, sec. 7, *Held*, the trial court might make such order affecting the litigation as in its discretion seems fit, affecting the bill, or matters not involved in the appeal, unless a stay had been ordered as authorized by the above statute. *Cuyler v. The Atlantic & N. C. R. Co.*, 132 *Fed. R.* 568-569.

When a sworn bill presents grave questions of law it should be decided on argument and after careful consideration; and when it appears that injury to the moving party may be immediate and certain, and that no injury will be done to defendant by the order, or only such injury as may be provided against by bond, it is a reasonable and proper practice to grant the temporary injunction. *Lehman v. Graham*, 135 *Fed. R.* 39-43, 67 *C. C. A.* 513.

The Supreme Court has inherent power to modify or annul an injunction during the pendency of an appeal, but as its exercise would require the examination of the record that court adopted former Rule 93, leaving to the determination of the trial judge, at the time the appeal is allowed, the question whether the effect of the injunction should be suspended or not pending the appeal. *Leonard v. Ozark Land Co.*, 115 *U. S.* 465-468, 29 *L. ed.* 445.

A supersedeas does not change the pronouncement of the court rendering the decree, or reverse the rights even temporarily, unless upon the allowance of the appeal an order is entered expressly limiting its force. The court has power to punish for contempt for acts inconsistent with the rights pronounced. The further direct act of the trial court in the execution of its decree is stayed, but the decree determining the rights of the parties is not stayed, nor the court's power to punish for contempt. *Green Bay & M. C. Co. v. Norrie*, 118 *Fed. R.* 923-925.

Held: the power granted by former Rule 93 should be exercised if there is danger of irreparable injury, but if not exercised the effect of the injunction is not suspended pending appeal, and disobedience is contempt of the court granting it. *Ib.* 924.

Independently of the Rule an appeal from a decree denying an injunction does not operate as an injunction or stay of the proceedings, nor does an appeal from an order dissolving an injunction suspend the operation of the order so as to enable the appellant to stay the proceedings pending the appeal. *Slaughter House Cases*, 10 *Wall.* 273-297, 19 *L. ed.* 922, Dec. T., 1869.

RULE LXXV—*Record on Appeal—Reduction and Preparation*

In case of appeal:

(a) It shall be the duty of the appellant or his solicitor to file with the clerk of the court from which the appeal is prosecuted, together with proof or acknowledgment of service of a copy on the appellee or his solicitor, a *præcipe* which shall indicate the portions of the record to be incorporated into

the transcript on such appeal. Should the appellee or his solicitor desire additional portions of the record incorporated into the transcript, he shall file with the clerk of the court his *præcipe* also within ten days thereafter, unless the time shall be enlarged by the court or a judge thereof, indicating such additional portions of the record desired by him.

(b) The evidence to be included in the record shall not be set forth in full, but shall be stated in simple and condensed form, all parts not essential to the decision of the questions presented by the appeal being omitted and the testimony of witnesses being stated only in narrative form, save that if either party desires it, and the court or judge so directs, any part of the testimony shall be reproduced in the exact words of the witness. The duty of so condensing and stating the evidence shall rest primarily on the appellant, who shall prepare his statement thereof and lodge the same in the clerk's office for the examination of the other parties at or before the time of filing his *præcipe* under paragraph *a* of this rule. He shall also notify the other parties or their solicitors of such lodgment and shall name a time and place when he will ask the court or judge to approve the statement, the time so named to be at least ten days after such notice. At the expiration of the time named or such further time as the court or judge may allow, the statement, together with any objections made or amendments proposed by any party, shall be presented to the court or the judge, and if the statement be true, complete and properly prepared, it shall be approved by the court or judge, and if it be not true, complete or properly prepared, it shall be made so under the direction of the court or judge and shall then be approved. When approved, it shall be filed in the clerk's office and become a part of the record for the purposes of the appeal.

(c) If any difference arise between the parties concerning directions as to the general contents of the record to be prepared on the appeal, such difference shall be submitted to the court or judge in conformity with the provisions of paragraph *b* of this rule and shall be covered by the directions which the court or judge may give on the subject.

Decisions

The only question for the consideration of the court or judge upon an application for an appeal is the sufficiency of the security offered for the costs and damages, or for the costs alone, and if the petitioner presents satisfactory security and prays an appeal in accordance with the statutes and the rules of the court, its allowance is of course. *Simpson v. First National Bank*, 129 *Fed. R.* 257-259, 63 *C. C. A.* 371.

RULE LXXVI—*Record on Appeal—Reduction and Preparation—Costs—Correction of Omissions*

In preparing the transcript on an appeal, especial care shall be taken to avoid the inclusion of more than one copy of the same paper and to exclude the formal and immaterial parts of all exhibits, documents and other papers included therein; and for any infraction of this or any kindred rule the appellate court may withhold or impose costs as the circumstances of the case and the discouragement of like infractions in the future may require. Costs for such an infraction may be imposed upon offending solicitors as well as parties.

If, in the transcript, anything material to either party be omitted by accident or error, the appellate court, on a proper suggestion or its own motion, may direct that the omission be corrected by a supplemental transcript.

A new Rule promulgated November 4, 1912.

RULE LXXVII—*Record on Appeal—Agreed Statement*

When the questions presented by an appeal can be determined by the appellate court without an examination of all the pleadings and evidence, the parties, with the approval of the District Court or the judge thereof, may prepare and sign a statement of the case showing how the questions arose and were decided in the District Court and setting forth so much only of the facts alleged and proved, or sought to be proved, as is essential to a decision of such questions by the appellate court. Such statement, when filed in the office of the clerk of the District Court, shall be treated as superseding, for the purposes of the appeal, all parts of the record other than the decree from which the appeal is taken, and, together with

such decree, shall be copied and certified to the appellate court as the record on appeal.

A new Rule promulgated November 4, 1912.

RULE LXXVIII—*Affirmation in Lieu of Oath*

Whenever under these rules an oath is or may be required to be taken, the party may, if conscientiously scrupulous of taking an oath, in lieu thereof make solemn affirmation to the truth of the facts stated by him.

Same as Rule 91 of the Rules adopted March 2, 1842.

RULE LXXIX—*Additional Rules by District Court*

With the concurrence of a majority of the circuit judges for the circuit, the District Courts may make any other and further rules and regulations for the practice, proceedings and process, mesne and final, in their respective districts, not inconsistent with the rules hereby prescribed, and from time to time alter and amend the same.

An amendment of Rule 89 of the Rules adopted March 2, 1842.

Statutory Provisions

Sec. 918, *Rev. Stats. (U. S. Comp. Stats. 1901, p. 685)* reads as follows:

"The several Circuit and District Courts may, from time to time, and in any manner not inconsistent with any law of the United States, or with any rule prescribed by the Supreme Court, under the preceding section, make rules and orders, directing the returning of writs and processes, the filing of pleadings, the taking of rules, the entering and making of judgments by default, and other matters in vacation, and otherwise regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings."

Decisions

Authority was conferred by sec. 17 of the Judiciary Act (Sept. 24, 1789, 1 *Stat. L.* 83) upon all the courts of the United States to make all necessary rules, provided such rules are not repugnant to law. *Pomeroy's Lessee v. Bank*, 1 *Wall.* 592-599, 17 *L. ed.* 640, Dec. T., 1863.

Held, the Supreme Court could not by rule enlarge or restrict its own inherent jurisdiction and powers, or those of the other courts of the United States or of a justice or judge of either court, under the Constitution and laws of the United States. *Hudson v. Parker*, 156 *U. S.* 284, 39 *L. ed.* 424.

The rules prescribed by the Supreme Court are obligatory on the Circuit (District) Courts, but every court of equity possesses the power to mould its rules in relation to the time and manner of appearing and answering so as to prevent the rule from working injustice. The rules prescribed were not intended to deprive the courts from exercising a sound discretion in enlarging the time prescribed by the rules, whenever it shall appear that the purposes of justice require it. *Poultney v. City of Lafayette*, 12 *Pet.* 472-475, 9 L. ed. 1161.

The Circuit (District) Court may, in any manner not inconsistent with any law of the United States or with any rule prescribed by the Supreme Court, regulate its own practice to advance justice. *Steam Stone Cutter Co. v. Jones*, 13 *Fed. R.* 567-581.

No practice of the Circuit (District) Court, inconsistent with the rules prescribed, can be admitted to control them. *Bank of the U. S. v. White*, 8 *Pet.* 262-269, 8 L. ed. 938.

The prescribing of this body of rules by the Supreme Court does not exclude other rules by the Circuit (District) Courts, as to matters not actually covered by the rules prescribed by the Supreme Court. *Van Hook v. Pendleton*, 2 *Blatchf. C. C.* 85; *Fed. Cases*, 16,852.

The Circuit (District) Court has not the authority to rescind a rule adopted by the Supreme Court for the government of its practice in chancery. *Jenkins v. Greenwald*, 1 *Bond*, 126; *Fed. Cases*, 7,270.

No District Court has power to adopt a practice inconsistent with the rules prescribed by the Supreme Court, nor to disregard their provisions. *Northwestern M. L. Ins. Co. v. Keith*, 77 *Fed. R.* 374.

Any rule prescribed by the Circuit (District) Court in violation of the rules prescribed by the Supreme Court, is a nullity. The only modifications or additions which can be made by the Circuit (District) Court in such rules are such as shall not be inconsistent with the rules prescribed by the Supreme Court. *Story v. Livingston*, 13 *Pet.* 359-368, 10 L. ed. 200.

The fact that one judge may not dispense with rules made under a statute by the whole court, nor a court dispense with a rule or order prescribed by a statute itself, is not inconsistent with the power of the court to enlarge the time prescribed for an answer, or allow a plea to be filed after the time fixed by the rules. *Wallace v. Clarke*, 3 *Woodb. & M.* 359; *Fed. Cases*, 17,098.

Former Rule 89 expressly authorized the several Circuit Courts to alter or add to that kind of the rules prescribed, in a manner not inconsistent with them. *Ib.*

The mode of conducting trials, the order of introducing evidence, and the times when it is to be introduced, are properly matters belonging to the practice of the Circuit (District) Courts, unless fixed general rules have been prescribed under the authority of the Act of Congress. A case at law. *Phila. & Trenton R. Co. v. Stimpson*, 14 *Pet.* 448-463.

Under the judiciary and process acts the courts have power to adopt rules to regulate proceedings on execution. *Ross v. Duval*, 13 *Pet.* 60, 10 L. ed. 51.

All rules are established to facilitate and promote justice and not to embarrass and defeat it, and may be departed from in matters of taking evidence, in the discretion of the court. *Russell v. McLellan*, 3 *Woodb. & M.* 157; *Fed. Cases*, 12,158.

In the Federal court the equity practice, when not controlled by the Act of Congress or the rules prescribed by the Supreme Court, is in general regulated by the chancery practice as it existed in England prior to the adoption of what is called the new rules. *Goodyear v. Providence Rubber Co.*, 2 *Cliff.* 351; *Fed. Cases*, 5,583.

Under the rules in force prior to the revision promulgated November 4, 1912, the first edition of Daniels' Chancery Practice, published in 1837, and the second edition of Smith's Chancery Practice, published in the same year, were declared to be the most authoritative works on chancery practice in use in 1842, when the equity rules prescribed by the Supreme Court were adopted. Supplemented by the general orders made in 1841 they exhibited the "present practice" adopted by former Rule 90 as the standard, where the rules prescribed did not apply. Note to *Thompson v. Wooster*, 114 *U. S.* 112, 29 L. ed. 107.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, the rules prescribed by the Supreme Court did not purport to regulate all the points of practice. They are intended to facilitate practice. Therefore a practice obtaining in the English chancery, not inconsistent with the rules, which assists in relieving the court and parties, was deemed adopted by former Rule 90. *Stevens v. Missouri, K. & T. R. Co.*, 104 *Fed. R.* 935.

Under the rules in force prior to the revision promulgated November 4, 1912, *Held*, the Rule applied only to forms of proceedings and modes of practice, and did not authorize the adoption by a Circuit Court of a State law defining the rights and obligations of parties to an injunction bond. *Bein v. Heath*, 12 *How.* 168-178, 12 L. ed. 416.

State regulations to the extent that they define the rules of property are regarded as furnishing the rule of decision in suits at common law;

but they do not control or affect the process or practice of the Federal courts. *Wayman v. Southard*, 10 *Wheat.* 1-42, 6 L. ed. 253.

Under *Rev. Stats.*, sec. 913 (*U. S. Comp. Stats.* 1901, p. 683), a Federal court has power in equity in the absence of an express rule of court, dealing with the taxation of costs, to adopt a State fee bill which allows fees to the solicitors for drawing the pleadings. *Matheson v. Hanna-Schoelkopf Co.*, 128 *Fed. R.* 163-164.

A District Court is authorized by sec. 918, *Rev. Stats.* (*U. S. Comp. Stat.* 1901, p. 685) to adopt a rule providing that if execution be returned unsatisfied the plaintiff may obtain an *ex parte* order to examine the defendant and other persons before a judge or commissioner, and if proper have further proceedings in the nature of bills of discovery. *Walker v. Monad Eng. Co.*, 196 *Fed.* 206, 116 *C. C. A.* 38.

RULE LXXX—*Computation of Time—Sundays and Holidays*

When the time prescribed by these rules for doing any act expires on a Sunday or legal holiday, such time shall extend to and include the next succeeding day that is not a Sunday or legal holiday.

A new Rule promulgated November 4, 1912.

RULE LXXXI—*These Rules Effective February 1, 1913—Old Rules Abrogated*

These rules shall be in force on and after February 1, 1913, and shall govern all proceedings in cases then pending or thereafter brought, save that where in any then pending cause an order has been made or act done which cannot be changed without doing substantial injustice, the court may give effect to such order or act to the extent necessary to avoid any such injustice.

All rules theretofore prescribed by the Supreme Court, regulating the practice in suits in equity, shall be abrogated when these rules take effect.

A new Rule promulgated November 4, 1912.

RULES OF PRACTICE
FOR
THE COURTS OF THE UNITED STATES
IN
ADMIRALTY AND MARITIME JURISDICTION

ON THE

*Instance Side of the Court, in Pursuance of the Act of the
23d of August, 1842, Chapter 188*

Decisions

The judicial power of the courts of the United States in all cases of admiralty and maritime jurisdiction, is delegated by the Constitution in general terms. No State law can enlarge it, nor can an Act of Congress or rule of court make it broader than the judicial power may determine to be its true limits, to be ascertained by a reasonable and just construction of the words used in the Constitution. *The Steamer St. Laurence*, 1 *Black*, 522-527, 17 L. ed. 182, Dec. T., 1863.

The rules of practice of the Supreme Court in admiralty proceedings are merely intended to regulate the remedy and have no relation to the question of jurisdiction. *In re Kirkland*, 12 *Am. Law Register*, 300; *Fed. Cases*, 7,842.

The Act of May 8, 1792, 1 *Stat. L.* 275, and the Act of Aug. 23, 1842, 5 *Stat. L.* 516, did not authorize the Supreme Court by its rules to alter or enlarge the jurisdiction of the Federal courts in respect to nonresidents of the district in which the suit is brought. *New Eng. Ins. Co. v. Detroit & C. Steam Nav. Co.*, 10 *Am. Law Reg.*, N. S. 383; *Fed. Cases*, 10,154; *Tolland v. Sprague*, 12 *Pet.* 300, 9 L. ed. 1105.

Where a right of action given for death by wrongful act by a State statute is sought to be enforced in admiralty, the State statute must be applied in admiralty just as if the suit had been brought in a State court, and any defenses which are open to the defendant under the jurisprudence of the State, if sufficient, will, if maintained, bar recovery under the libel. Where the deceased's negligence directly or indirectly

contributing to the injury is a good defense under the laws of the State, it will be an equally good defense to the proceeding in admiralty. *Quinette v. Bisso*, 136 *Fed. R.* 825-838, 69 *C. C. A.* 496.

An admiralty court, in administering a State statute giving a right of action for a wrongful death in a collision on waters subject to maritime jurisdiction, should be governed in the measure of damages by the decisions of the highest courts of such State, and the measure of damages should be ascertained according to the law of the place where the action is tried. *The Saginaw and Hamilton*, 139 *Fed. R.* 906-912.

Courts of admiralty are not bound by the verdicts of juries in other proceedings. Courts of admiralty determine the measure of damages in such cases by the methods which they would instruct juries to adopt if the cases were tried by a jury, but the amounts found by juries in particular cases cannot be regarded as precedents for other cases. *Ib.* 912.

A lien given by a State statute is not a test of admiralty jurisdiction, which depends on whether the right created by the local law is maritime in its nature. *The James T. Furber*, 129 *Fed. R.* 808-811.

The lease of a wharf or a contract for the use of a wharf is a lease of real estate, and not a maritime contract within the jurisdiction of an admiralty court to maintain a suit for the collection of rent. *Ib.* 813.

Contra. It is immaterial that the lien is not created by the maritime law, as the admiralty enforces liens created by statute or by agreement. *Covert v. British Brig Wexford*, 3 *Fed. R.* 577-579.

A citizen of the United States who is a party to a suit of admiralty and maritime jurisdiction cannot be deprived of the right to have such suit adjudicated by an admiralty court by treaty stipulations with a foreign nation. *The Neck*, 138 *Fed. R.* 144-148.

In the exercise of discretion, the courts having jurisdiction of admiralty causes may take jurisdiction of an action by an alien seaman against foreign ships, as a matter of comity, or refuse to do so, and the government may by treaty stipulations bind the court to observe a policy of noninterference; but the Government, including the courts, exists for the benefit of the people who constitute the body politic, and every individual citizen has an absolute right to invoke the justice of the country through established tribunals, in a manner prescribed by general rules. *Ib.* 148.

District Courts are courts of record. In England courts of admiralty are not so regarded. Execution on a money decree rendered by the District Court in an admiralty suit may issue, and the decree is a lien on land if by the law of the State where the court sits decrees and judgments for money are a lien on land. *Ward v. Chamberlain*, 2 *Blatchf.* 430, 17 *L. ed.* 324.

RULE I

No *mesne* process shall issue from the District Courts in any civil cause of admiralty and maritime jurisdiction until the libel, or libel of ^{*Mesne* process not to issue until libel filed.} information, shall be filed in the clerk's office from which such process is to issue. All process shall be served by the marshal or by his deputy, or, where he ^{By whom to be served.} or they are interested, by some discreet and disinterested person appointed by the court.

Decisions

The general course of admiralty practice in the United States requires a sworn libel as a foundation of any process of attachment or arrest. *Martin v. Walker*, 1 *Abb. Ad.* 579; *Fed. Cases*, 9,170.

The marshal may deputize a person not a regular deputy marshal to serve process directed to him to serve. *The E. W. Gorgas*, 10 *Ben.* 460; *Fed. Cases*, 4,585.

The practice in admiralty requires a sworn libel previous to the issue of process *in rem*. *Ib.*

Service of a subpoena directed to a witness or notice directed to a party need not necessarily be served by the marshal. *Schwabaker v. Reilly*, 2 *Dill.* 127; *Fed. Cases*, 12,501.

The marshal is required by Act of Congress to execute throughout his district all lawful precepts directed to him, issued under the authority of the United States. *Ib.*

Service of monition in admiralty may be made under the provisions of the State statutes regulating the mode of service in actions at law and in equity. *Doe v. Springfield B. & Mfg. Co.*, 104 *Fed. R.* 684-686, 44 *C. C. A.* 128.

It is not necessary to sustain proceedings for limiting liability under secs. 4283-4284, *Rev. Stats.* (*U. S. Comp. Stats.* 1901, p. 2943), that the respondent owners should be personally served with notice. *In re Morrison*, 147 *U. S.* 14-34, 37 *L. ed.* 60.

The libel should be signed and verified before the issuance of process. If the signature is omitted the defect may be cured by amendment. *Hardy v. Moore*, 4 *Fed. R.* 843-845.

Where the seal is omitted from the process, or a wrong seal affixed, the court has the power to allow an amendment where the defendant has appeared generally. *Wolfe v. Cook*, 40 *Fed. R.* 432-437.

A summons issued out of the District Court under the seal of the District Court, but tested in the name of the chief justice, instead of the district judge as required by sec. 911, *Rev. Stats. (U. S. Comp. Stats., 1901, p. 683)*, may be amended. *United States v. Turner*, 50 *Fed. R.* 734.

The power of amendment can only be exercised in cases where the court has acquired jurisdiction over the defendant or he has submitted himself to the jurisdiction. There must be something to amend and to amend by. *Ib.* 735.

The rules prescribed by the Supreme Court for the regulation of process in courts of admiralty are conclusive on the subject. *Marshall v. Bazin*, 7 *N. Y. Legal Obs.* 342; *Fed. Cases*, 9,125.

Where the appeal bond is the only appeal process in the case it must name all the parties which the appeal is intended to bring before the court, and if defective it cannot be cured by amendment in the appellate court. *The City of Lincoln*, 19 *Fed. R.* 460-461.

Where sale of a vessel to a *bona fide* purchaser without knowledge of impending claim has been had, a libel filed before the sale takes place, and the issue of an attachment without seizure of the vessel is not constructive notice of the pendency of a suit. *The Robert Gaskin*, 9 *Fed. R.* 62-63.

Suit cannot be regarded as commenced until process is served either upon the person or the property. *Ib.* 63.

In a cross-libel the court has power to order the monition thereon served on the proctor of the owners of a cargo libeled, the owners being nonresidents, and on such service to proceed to judgment against the owners personally; and a subsequent dismissal of their own libel, of their own motion, will not affect the jurisdiction. *The Eliza Lines*, 61 *Fed. R.* 308-324.

A general appearance to a suit by respondent and answer upon the merits without objection is a waiver to a misnomer in the libel and monition. *The Miner v. I. V. Florio S. S. Co.*, 23 *Fed. R.* 915-916.

Where there is no prayer for monition or personal judgment on the libel and no service of process upon the owner, the fact that he appears by attorney to answer a libel *in rem*, and defend the *res*, does not give the court jurisdiction to render a personal judgment against him. *The Ethel*, 66 *Fed. R.* 340-342, 13 *C. C. A.* 504.

Ordinary practice in admiralty does not permit a personal judgment to be entered upon a suit *in rem*. A foreign owner may appear in court to reclaim his property against unauthorized seizure without being subject to liability to a personal judgment when he has never been cited to defend. *The Monte A.*, 12 *Fed. R.* 331-335.

An action *in rem* is limited to the proceeding against the *res*, and a general appearance in such an action is no more general than the limited nature of the action itself, and of no greater effect than a special appearance to vacate an unauthorized attachment in an action *in personam*, and does not cure any essential defect of jurisdiction of the subject-matter. *Ib.* 335.

When a stipulation under *Rev. Stats.* 941 (*U. S. Comp. Stats.* 1901, p. 692), was given in these words: "Personally appeared (claimants and his surety, naming them) who, submitting themselves to the jurisdiction of this court, bind and oblige themselves," etc., upon a warrant of arrest afterward declared void, *Held*, that the stipulation was under duress and only bound the promisor to submit to the jurisdiction so far as he was subject to it when the suit commenced, and that by such submission objection to the jurisdiction had not been waived. *The Berkeley*, 58 *Fed. R.* 920-923.

The jurisdiction of the court to enforce a lien for freight is not impaired by the filing of a libel before the right of action has matured. *Clarke v. Five Hundred and Five Thousand Feet of Lumber*, 65 *Fed. R.* 236-239, 12 *C. C. A.* 628.

The Act of Congress fixing the times and places of holding terms of court in the State of Washington provides that suits not of a local character shall be brought in the division in which the defendant resides. *Held*, that a libel *in rem* must be brought in the division where the property proceeded against is found. *The Wilamet*, 53 *Fed. R.* 602.

Process in the hands of a marshal when he goes out of office, under which he has prior to that time made a levy and attachment, may be executed by such marshal after he has ceased to hold the office. *Cushing v. Laird*, 4 *Ben.* 70; *Fed. Cases*, 3,508.

RULE II

In suits *in personam*, the *mesne* process may be by a simple warrant of arrest of the person of the defendant, in the nature of a *capias*, or ^{Mesne process in suits in personam. — Nature of.} by a warrant of arrest of the person of the defendant, with a clause therein, that if he cannot be found, to attach his goods and chattels to the amount sued for; or if such property cannot be found, to attach his credits and effects to the amount sued for in the hands of the garnishees named therein; or by a simple monition, in the ^{Or by monition.} nature of a summons to appear and answer to the suit, as the libellant shall, in his libel or information, pray for or elect.

Decisions

Service of monition in admiralty may be made upon an agent of the nonresident defendant in conformity to the provisions of the State statute regulating the mode of service in an action at law or in equity. *Insurance Co. v. Frederick Leyland & Co.*, 139 *Fed. R.* 67-68.

To the same effect, *In re Louisville Underwriters*, 134 *U. S.* 488, 33 *L. ed.* 991.

Service of a citation in a libel *in personam* upon a servant in the defendant's family, at his residence, is not sufficient under Rule 2, which requires that the citation shall be personally served on the defendant. If the defendant is evading service, the remedy is to take out a citation with a clause of attachment under Rule 9. *Walker v. Hughes*, 132 *Fed. R.* 885-886.

By the ancient and settled practice of courts of admiralty a libel *in personam* may be maintained for any cause within their jurisdiction wherever an attachment may be made of any personal property or credits of the respondent. *In re Louisville Underwriters*, 134 *U. S.* 488-490, 33 *L. ed.* 991.

Act of Mar. 3, 1887, ch. 373, sec. 1, 24 *Stat. L.* 552, prohibiting suits outside the district where defendant resides declared not to be applicable to suits in admiralty. *Ib.* 490.

A foreign corporation may be sued in admiralty in any district in which service of process may be made upon its attorney or agent appointed by the corporation to receive service of legal process under a statute of the State in which suit is brought. *Ib.* 493.

In a libel against a foreign corporation brought by an American seeking to recover damages *in personam*, by an attachment sued out under Rule 2, and levied upon the property of the respondent, *Held*, the procedure conformed to the settled practice of the Federal courts in admiralty cases. *Pouppirt v. Elder Dempster Shipping Co.*, 122 *Fed. R.* 983-988.

In such case the maritime law as administered by the courts of the country where the suit is prosecuted will be applied. *Ib.* 988.

A court has discretion, apart from statute or treaty, to decline jurisdiction of an admiralty suit *in rem*, for a tort committed at sea, and between foreigners or against a foreign vessel. *Ib.* 987.

An admiralty suit is within the terms of sec. 4 of the Act of Feb. 28, 1887, providing that all suits not of a local nature, brought in the Federal courts in Missouri, must be brought in the division having jurisdiction over the county where the defendants, or either of them, reside. *The LBX*, 88 *Fed. R.* 290-293.

The case of *In re Louisville Underwriters*, *Held*, not applicable. *Ib.* 293.

A suitor in admiralty is not compelled to resort to the home of the defendant when its goods or credits can be attached in other jurisdictions. The process for attachment and garnishment may be used in lieu of personal service in cases where the owner or master cannot be served with process. *Ib.* 293.

Held, at the Oct. T., 1873, that the prohibition in sec. 11 of the Act of 1879, as to the locality of arrests and suits does not apply to suits in admiralty. *Atkins v. Disintegrating Co.*, 18 *Wall.* 272-306, 21 L. ed. 841.

The District Court of the United States sitting in admiralty, can obtain jurisdiction to proceed *in personam* against a person not residing within the district, by attachment of the goods or property of such person within the district where the defendants enter their appearance without reservation. *Ib.* 298-301.

Jurisdiction of a suit in admiralty *in personam* is obtained and the suit is maintainable, provided process is duly served upon the respondent within the district where the suit is instituted, no matter where the cause of action arose. *Reilly v. Phila. & Reading R. Co.*, 109 *Fed. R.* 349-350.

Service of process upon a mere director of a foreign corporation who is found within the district, but who neither transacts any corporate business there nor is charged therein with any business of the corporation, is not sufficient service upon the corporation to confer jurisdiction. *Ib.*

Where the defendants have never been served with process or entered an appearance, the decree will not bind them personally, but only their property attached, within the jurisdiction of the court. *Boyd v. Urquhart*, 1 *Spr.* 423; *Fed. Cases*, 1,750.

Rules 2 and 3 give the parties having a subsisting right of action, the right to a warrant of arrest, and to advantage of bail to satisfy the final decree rendered in the cause. *Marshall v. Bazin*, 7 *N. Y. Legal Obs.* 342; *Fed. Cases*, 9,125. But see Rule 47.

The jurisdiction of the court *in personam* in matters of contract has no connection with the question of lien. In the former the party is proceeded against on his personal liability by process of arrest or citation. *Ib.*

If the defendant cannot be found, his goods and chattels attached may, in default of appearance, be sold to satisfy the decree to be rendered. *Lee v. Thompson*, 3 *Woods*, 167; *Fed. Cases*, 8,202.

The process by attachment may issue whenever process cannot be served upon the defendant, and in cases of default the property attached may be condemned to answer the demand of the libellant. *Manro v. Almeida*, 10 *Wheat.* 473-487, 6 L. ed. 369.

It is not necessary that the property to be attached should be specified in the libel. *Ib.* 495.

As goods and credits in the hands of a third person wherever situated may be attached by notice, so the process of attachment by notice is valid, where the officer cannot have access to the goods themselves. *Manro v. Almeida, Ib.* 493.

In this case, decided in 1825, *Held*, that the process of attachment required the judge's order. *Ib.* 496.

In a court of admiralty a process of foreign attachment is auxiliary and incidental to the principal suit. *Cushing v. Laird*, 107 *U. S.* 69-76, 27 *L. ed.* 391.

A cause in admiralty is a civil suit within the meaning of the Judiciary Act of 1789, sec. 11, and no proceeding can be had against the respondent who is not an inhabitant of or found within the district by an attachment against his property. Decided in 1871. *New England Ins. Co. v. Detroit & C. S. N. Co.*, 10 *Am. Law Reg.* 383; *Fed. Cases*, 10,154.

This construction does not deny the power of admiralty courts to issue process of attachment when the respondent is an alien nonresident, nor when an inhabitant he absconds or conceals himself, but restricts and prohibits such process to be issued when respondent is an actual inhabitant of another district. *Ib.*

To the same effect, *Alkins v. Fiber Disintegrating Co.*, 7 *Blatchf.* 555; *Fed. Cases*, 602.

In a civil cause of admiralty and maritime jurisdiction *in personam*, the District Court of the United States can acquire jurisdiction of the cause by serving of an attachment on the goods and chattels of the defendant within the jurisdiction where the defendants cannot be found personally within such jurisdiction. The fact that a defendant is not an inhabitant of the United States, and has never been within the limits of the United States, does not affect the jurisdiction. *Cushing v. Laird*, 4 *Ben.* 70; *Fed. Cases*, 3,508.

Before an attachment is levied a marshal should return that respondent cannot be found, and before a garnishment issues, both that the respondent cannot be found, and that none of respondent's goods and chattels can be found within the district. *Ib.*

The process need not contain on its face a citation for the garnishee. *Ib.*

An attachment will be set aside where no proper attempt is made to find or serve the respondent personally, before levying the attachment. *Provost v. Pigeon*, 9 *Fed. R.* 409-411.

Where the marshal actually or in legal effect makes return that he made a reasonable effort to serve the respondent before making the

attachment, the return is to be deemed true, and allowed to stand, and, if denied, the marshal left to justify it in an action against him for false return. *Harriman v. Rockaway Beach Pier Co.*, 5 *Fed. R.* 461-462.

In suits *in personam* the attachment of property is not authorized by Rule 2, except where the defendant cannot be found; and then where the warrant of arrest is authorized, under the law of the State where issued. Where a warrant of arrest of the person of the defendant is unauthorized and illegal under the law of a State, a writ of attachment which is dependent on such warrant of arrest is unauthorized. *Chiesa v. Canova*, 36 *Fed. R.* 334.

An attachment requires first the issuance of a warrant of arrest and a failure to find the defendant, and can be used only in case the defendant is absent and cannot be found to be personally served. When the defendant is present, but under the laws of the State is not subject to arrest, his property may not be attached under Rule 2. *The Bremena v. Card*, 38 *Fed. R.* 144-147.

Upon a garnishment served upon a dry dock company, *Held*, that ships and other personal property of like nature, are "effects" within the meaning of Rule 2. *The Alpina*, 7 *Fed. R.* 361-364.

By the service of garnishment the marshal does not take possession of the fund and a subsequent writ of garnishment from a State court may have effect, subject to the first garnishment levied. *The Olivia A. Carrigan*, 7 *Fed. R.* 507-510.

RULE III

In all suits *in personam*, where a simple warrant of arrest issues and is executed, the marshal may take bail, with sufficient sureties, from the party arrested, by bond or stipulation, upon condition that he will appear in the suit and abide by all orders of the court, interlocutory or final, in the cause, and pay the money awarded by the final decree rendered therein in the court to which the process is returnable, or in any appellate court. And upon such bond or stipulation summary process of execution may and shall be issued against the principal and sureties by the court to which such process is returnable, to enforce the final decree so rendered, or upon appeal by the appellate court.

In suits *in personam*, when marshal may take bail.

Summary process on bail bond.

Decisions

The term "The Court" means the court which shall ultimately decide the cause. *United States v. Schooner Little Charles*, 1 *Brock C. C.* 380; *Fed. Cases*, 15,613.

Respondent arrested upon a bailable warrant to be discharged, must give a stipulation not only for the costs, but to satisfy the decree against him. *Gardner v. Isaacson*, *Abb. Ad.* 1-41; *Fed. Cases*, 5,230.

Stipulators cannot be held beyond the definite sum which they have bound themselves to make good on default of the principal, unless they have been guilty of default, when they may be held for costs and interest by way of damages. *The Wanata*, 95 *U. S.* 600-605.

Although the decree exceeds the sum named in the stipulation, the surety cannot be compelled to pay more than that amount. *The Ann Caroline*, 2 *Wall.* 538-549, 17 *L. ed.* 833.

They cannot be made liable as stipulators beyond the extent of their stipulation. *The Steamer Webb*, 14 *Wall.* 406-418, 20 *L. ed.* 774.

Where bail has been given to appear and abide by the orders of the court it is not necessary to take out execution against the principal, to obtain the monition to the bail to appear and show cause why he should be required to satisfy the decree. *In re Snow*, 2 *Curt.* 485; *Fed. Cases*, 13,141.

The form of the stipulation is for the appearance of the party to abide by the decree in the cause and not for the payment of the sum decreed. *Grace v. Evans*, 3 *Ben.* 479; *Fed. Cases*, 5,650.

The attachment may be had only where respondent cannot be found. Where respondent was arrested and his property attached, *Held*, the attachment must be set aside. *Ib.*

By promulgation of the rules the authority of arrest and imprisonment on admiralty process is expressly declared. *Gaines v. Travis*, *Abb. Ad.* 422; *Fed. Cases*, 5,180.

There is no rule which requires notice of a final decree. Execution may be issued summarily against the stipulators if the decree is not satisfied. *Ib.*

The libellant cannot require additional stipulation, where the bond has been given pursuant to Rule 3. *Gaines v. Travis*, *Abb. Ad.* 297; *Fed. Cases*, 5,179.

Rule 3, *Held*, to be governed by Rule 47 and secs. 990-991, *Rev. Stats.* *Stone v. Murphy*, 86 *Fed. R.* 158-160.

The court will not suffer a party to be held to bail in two places at one time. *Bingham v. Wilkins, Crabbe*, 50; *Fed. Cases*, 1,416.

RULE IV

In all suits *in personam*, where goods and chattels, or credits and effects, are attached under such warrant authorizing the same, the attachment may be dissolved by order of the court to which the same warrant is returnable, upon the defendant whose property is so attached giving a bond or stipulation, with sufficient sureties, to abide by all orders, interlocutory or final, of the court, and pay the amount awarded by the final decree rendered in the court to which the process is returnable, or in any appellate court; and upon such bond or stipulation, summary process of execution shall and may be issued against the principal and sureties by the court to which such warrant is returnable, to enforce the final decree so rendered, or upon appeal by the appellate court.

When attachment in personam may be dissolved.

Summary process on attachment bond.

Decisions

Bail is a substitute for the property as regards all the claims to be made against it by the promoter of the suit. It is security, and not for the amount of the claim, but for the value of the property to the same extent as if it were still in the custody of the court. *United States v. Ames*, 99 *U. S.* 35-37, 25 *L. ed.* 295.

The usual practice is to require nonresident parties to supply at least two sureties, and libellants, if resident within the district, one surety, resident therein; but it is not indispensable to the validity of the stipulation in any case. *The Infanta, Abb. Ad.* 327; *Fed. Cases*, 7,031.

Irregularities in the proceedings known to the party concerned must be objected to at the first legal opportunity in court after the time of their occurrence or they will be deemed to be waived. *Ib.*

Sureties upon the bond for the release of property may not object that the court has not acquired jurisdiction to enter the decree, where the respondent has appeared or service has been made upon him, and respondent has obtained possession of the property by means of the bond. *Harriman v. Rockaway Beach P. Co.*, 8 *Fed. R.* 94-96.

But see *The Berkley*, 58 *Fed. R.* 920, where it was held that where the vessel is seized under an invalid warrant so that she cannot be held, the

sureties in a bond for her release are also discharged. The fact that the stipulation is in the words "personally appeared" does not in case of seizure under an invalid warrant operate as a general appearance and waive objection to the jurisdiction.

Sureties are discharged by amending the libel to join another party, or when the libellant takes notes as collateral security from the owners. *The Maggie Jones*, 1 *Flip.* 635; *Fed. Cases*, 8,947.

The decree in execution upon the bond may be awarded against the surety without a separate suit. *Munks v. Jackson*, 66 *Fed. R.* 571-573, 13 *C. C. A.* 641.

Upon a failure to give new or further stipulation as required by a court, it may stay its further proceedings, deny all relief or dismiss the libel and petition. *In re Morrison*, 147 *U. S.* 14-35, 37 *L. ed.* 60.

RULE V

Bonds or stipulations in admiralty suits may be given Bonds and stipulations; and taken in open court, or at chambers, by whom may be taken. or before any commissioner of the court who is authorized by the court to take affidavits of bail and depositions in cases pending before the court, or any commissioner of the United States authorized by law to take bail and affidavits in civil cases.

Statutory Provisions

Act Aug. 15, 1876, ch. 304. An Act to provide for the appointment of commissioners for taking affidavits, etc., for the courts of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that notaries public of the several States, Territories and the District of Columbia be, and they are hereby authorized to take depositions, and do all other acts in relation to taking testimony to be used in the courts of the United States, take acknowledgments and affidavits, in the same manner and with the same effect as commissioners of the United States Circuit Court may now lawfully take or do. Approved Aug. 15, 1876.

Decisions

Poor persons may sue in admiralty without security for costs upon making oath that they are unable to give security and the certificate of a reputable attorney that he has investigated the case and believes

the party has a good cause of action. *Bradford v. Bradford*, 2 *Flip.* 280; *Fed. Cases*, 1,766.

Appended to the case is the form of oath, order of the court, and a note by Hammond, J., who delivered the opinion.

RULE VI

In all suits *in personam*, where bail is taken, the court may, upon motion, for due cause shown, reduce the amount of the sum contained in the bond or stipulation therefor; and in all cases where a bond or stipulation is taken as bail, or upon dissolving an attachment of property as aforesaid, if either of the sureties shall become insolvent pending the suit, new sureties may be required by the order of the court, to be given, upon motion, and due proof thereof.

When bail may be reduced in personam or new sureties required.

Decisions

Where the sureties become insolvent application should be made to the court for an order requiring new sureties to be furnished. Disobedience to such order puts the party in contempt and he may be denied the right to further contest the suit until he complies with the order. *The Old Concord*, 1 *Brown's Adm.* 270; *Fed. Cases*, 10,482.

Rule 6 does not provide expressly for suit *in rem*, but under the authority of Rule 47 the court may require additional security upon motion and cause shown. *The City of Hartford*, 11 *Fed. R.* 89.

RULE VII

In suits *in personam*, no warrant of arrest, either of the person or property of the defendant, shall issue for a sum exceeding five hundred dollars, unless by the special order of the court, upon affidavit or other proper proof showing the propriety thereof.

Warrant of arrest in personam; when may issue.

Decisions

A sworn libel is required for the foundation of any process of attachment, but the affidavit which justifies the arrest may be a separate deposition. *Martin v. Walker*, *Abb. Ad.* 579; *Fed. Cases*, 9,170.

An action for an assault against the master, brought after an action instituted upon the same cause of action against the two mates of a ves-

sel not found in the jurisdiction, where it is not shown that the master knew of the purpose of the mates to assault the libellant, or could have prevented it, *Held*, not a case in which an order of arrest should issue without the security usually required. *Cole v. Tollison*, 40 *Fed. R.* 303-304.

RULE VIII

In all suits *in rem* against a ship, her tackle, sails, apparel, furniture, boats, or other appurtenances, if such tackle, sails, apparel, furniture, boats, or other appurtenances are in the possession or custody of any third person, the court may, after a due monition to such third person, and a hearing of the cause, if any, why the same should not be delivered over, award and decree that the same be delivered into the custody of the marshal or other proper officer, if, upon the hearing, the same is required by law and justice.

Suits in rem, ships, tackle, etc., how obtained possession of by court.

RULE IX

In all cases of seizure, and in other suits and proceedings *in rem*, the process, unless otherwise provided for by statute, shall be by a warrant of arrest of the ship, goods, or other thing to be arrested; and the marshal shall thereupon arrest and take the ship, goods, or other thing into his possession for safe custody, and shall cause public notice thereof and of the time assigned for the return of such process and the hearing of the cause, to be given in such newspaper within the district as the District Court shall order; and if there is no newspaper published therein, then in such other public places in the district as the court shall direct.

Cases of seizure, process in.

How marshal to execute same; what notice to give.

Decisions

The distinguishing feature of a suit in admiralty is that the vessel or thing proceeded against is itself seized and impleaded as the defendant, and is judged and sentenced accordingly. *The Moses Taylor*, 4 *Wall.* 411-427, 18 *L. ed.* 397.

The court may determine the question of its jurisdiction although the marshal's return shows a seizure outside of the jurisdiction. The question may be determined upon a plea to the jurisdiction, which

may be joined with an answer to the merits. *The Lindrup*, 70 *Fed. R.* 718-719.

The service of a regular process is a warning to all parties who have an interest in the cause to come in and protect their interest. Unless they do so, if due notice were given they are bound by the decree. *Commander in Chief*, 1 *Wall.* 43-52, 17 L. ed. 609.

The filing of a libel and issuance of an attachment without seizure of the vessel is not notice of the suit, even constructive. *The Robert Gaskin*, 9 *Fed. R.* 62-63.

Where claimants voluntarily give a stipulation to pay the decree rendered, the court has jurisdiction to proceed in a libel *in rem* against a vessel within the jurisdiction where the libel was filed, although no monition was issued and no seizure of the vessel made. *The Frank Vanderkerchen*, 87 *Fed. R.* 763-765.

Ordinarily, seizure of the property precedes the appearance of the claimants, but it makes no difference whether claimants voluntarily entered into the stipulation before the actual seizure or waited until the vessel had been taken into actual custody. *Ib.* 765.

In the execution of admiralty process *in rem* the officer should take actual possession and hold it in such manner that his possession may be seen. *The Hibernia*, 1 *Spr.* 78; *Fed. Cases*, 6,455.

Jurisdiction of the property is acquired by its seizure, by the marshal under process of the court, and this seizure and the process served by the marshal are, in view of the law, notice to all persons interested of the pendency of proceedings and of their right to intervene and protect their interests. *Daly v. Doe*, 3 *Fed. R.* 903-912.

The failure to publish notice before the default entered as required by the rule does not render the decree invalid. *Ib.* 912.

The whole world are parties in an admiralty cause. Every person, therefore, who can assert any title to the property has constructive notice by its seizure and is bound by any decree rendered respecting it. *The Mary*, 9 *Cranch*, 126-144, 3 L. ed. 678.

Where there are several authorities claimed competent to bind the goods of a party where executed by a proper officer, they should be considered effectually and for all purposes bound by the authority which first actually attaches upon them in point of execution, and under which an execution should first have been executed. *Taylor v. Carrol*, 20 *How.* 583-594, 15 L. ed. 1028.

Where the Federal and State courts have concurrent jurisdiction *in rem* the right to maintain the jurisdiction must attach to that tribunal

which first exercises it, and takes possession of the thing in litigation. *The Robert Fulton*, 1 *Paine*, 620; *Fed. Cases*, 11,890.

That a suit in replevin has been instituted in the State court does not supersede the right of a court of admiralty to proceed to enforce a lien *in rem*. Such suit being a paramount right against all persons whomsoever. *Certain Logs of Mahogany*, 2 *Sumn.* 589; *Fed. Cases*, 2,559.

Where there is a contest between process issued by a State court and process issued by a Federal court as to which made the first seizure, the sheriff should either apply to the State court to be protected, or to the Federal court to order its officer to withdraw. *The Circassian*, 1 *Ben.* 128; *Fed. Cases*, 2,721.

Where there is a conflict between the marshals of different districts exercising concurrent jurisdiction, the question of priority is properly raised by petition. *Ib.*

Where the sheriff under process from the State court has the custody of the property and the marshal seizes it, although such levy by the marshal does not operate to oust the sheriff, it becomes legal as soon as the sheriff abandons the levy and will take precedence of a collusive appointment thereafter of a receiver by the State court. *The Roslyn*, 9 *Ben.* 119; *Fed. Cases*, 12,068.

A court of admiralty will enforce paramount maritime liens by proceeding against a vessel sold under process in a State court; such sale and delivery to the purchaser does not divest or impair the paramount maritime liens. *The Gazelle*, 1 *Spr.* 378; *Fed. Cases*, 5,289.

The thing taken in proceedings *in rem* remains in the custody of the court until claims before the court are finally satisfied, and if the thing is taken from the officer, its redelivery will be enforced by attachment; whether taken by a party to the cause or not. *The Phoebe*, 1 *Ware*, 368, *Fed. Cases*, 11,066.

The court in its discretion may entertain two libels for the same cause of action, one *in personam* and one *in rem*. *La Normandie*, 58 *Fed. R.* 427-432, 7 *C. C. A.* 285.

A judgment *in personam* cannot ordinarily be entered in a suit *in rem* without an amendment, and the issue of new process or the voluntary appearance of the defendant. *The Monte A.*, 12 *Fed. R.* 331-337.

Motion to dismiss for want of jurisdiction in a libel *in rem* may be made even after full hearing had upon the merits. *The John C. Sweeney*, 55 *Fed. R.* 540-541.

The filing of a cross-bill *in personam* and obtaining a stay in the original libel, *Held*, not to be a waiver of objections on the ground that the lien is not maritime. *The Electra*, 74 *Fed. R.* 689-696, 21 *C. C. A.* 12.

The use of the process of attachment in admiralty has prevailed since the Federal courts were established. *Atkins v. Fiber Co.*, 18 *Wall.* 272-304, 21 *L. ed.* 844.

Since Congress may prescribe the forms and modes of proceedings in the judicial tribunals it establishes to carry into execution the judicial powers delegated by the Constitution; it may authorize the courts to proceed by attachments against property or by arrest of the person as may be deemed most to promote justice. *Steamer St. Lawrence*, 1 *Black*, 522-528, 17 *L. ed.* 183, Dec. T., 1863.

Where the libellant has acted in good faith under the advice of counsel, a cross-libel for damages caused by the attachment and detention of the vessel in the suit will not be sustained. *The Alcalde*, 132 *Fed. R.* 576-579.

Where the court is satisfied that a suit *in rem* for collision was brought in good faith, and that there has been no abuse of judicial process, a cross-libel for damages on account of the detention of the ship, by her seizure under the process of the court issued in the case at the instance of the libellant, will be dismissed. *The Admiral Cecille*, 134 *Fed. R.* 672-675.

In proceedings *in rem* the allowance of process is the act of the law, so that no damages are allowed for the arrest and detention of the vessel, unless where bad faith or deceit is practiced in suing out the writ, or unless the suit is one which may be characterized as a malicious prosecution. *Portland Shipping Co. v. The Alex Gibson*, 44 *Fed. R.* 371-374.

RULE X

In all cases where any goods or other things are arrested, if the same are perishable, or are liable to deterioration, decay, or injury, by being detained in custody pending the suit, the court may, upon the application of either party, in its discretion, order the same or so much thereof to be sold as shall be perishable or liable to depreciation, decay, or injury; and the proceeds, or so much thereof as shall be a full security to satisfy the

Perishable goods, how
may be sold.

decree, to be brought into court to abide the event of the suit; or the court may, upon the application of the claimant, Or may be delivered to claimant on his giving stipulation. order a delivery thereof to him, upon a due appraisement, to be had under its direction, either upon the claimant's depositing in court so much money as the court shall order, or upon his giving a stipulation, with sureties, in such sum as the court shall direct, to abide by and pay the money awarded by the final decree rendered by the court, or the appellate court, if any appeal intervenes, as the one or the other course shall be ordered by the court.

Decisions

If the cargo is liable to deteriorate or perish, or the ship to be injured by the delay incident to salvage proceedings, the proper course is to apply to the court for the sale thereof. It is not a matter of right for either party to have the delivery on bail in such cases. *The Ship Nathaniel Hooper*, 3 *Sumn.* 542; *Fed. Cases*, 10,032.

Under Rule 10 it is not sufficient ground to refuse the sale of a ship which is deteriorating in the hands of the marshal, because an appeal is pending as to the propriety of the court's entertaining jurisdiction while the ship was in the hands of a receiver appointed by a State court. *The Wilamett Valley*, 63 *Fed. R.* 130-132, 11 *C. C. A.* 11.

The property does not follow the appeal into the appellate court, but remains in the custody of the officer of the court below, which has the power to order it sold, notwithstanding the appeal, if liable to depreciation. *Jennings v. Carson*, 4 *Cranch*, 2-26, 2 *L. ed.* 531.

After an appeal the trial court still retains power to care for the goods seized, and may order a sale of such goods as are likely to perish. *Jones v. Walker*, 2 *Hayw. N. C.* 291; *Fed. Cases*, 7,506.

The court will protect the title of the purchaser to the property ordered to be sold as perishable, against both claimant and libellant. *Ib.*

RULE XI

In like manner, where any ship shall be arrested, the same Ship, when may be delivered to claimant. may, upon the application of the claimant, be delivered to him upon a due appraisement, to be had under the direction of the court, upon the claimant's depositing in court so much money as

the court shall order, or upon his giving a stipulation, with sureties, as aforesaid; and if the claimant shall decline any such application, then the court may, in its discretion, upon the application of either party, upon due Or when will be sold. cause shown, order a sale of such ship, and the proceeds thereof to be brought into court or otherwise disposed of, as it may deem most for the benefit of all concerned.

Decisions

The power to release on bail does not depend on any rule, but is an inherent power of the court. *Place v. City of Norwich*, 1 *Ben.* 89; *Fed. Cases*, 11,202.

Filing a stipulation to obtain the release of a vessel is not a waiver of the question of her liability. *The Fidelity*, 16 *Blatchf.* 569; *Fed. Cases*, 4,758.

If it shall appear on trial even after the merits are determined in favor of the claimants, that in reality they have no title to the property, the court will retain the property in its own custody until the true owner can interpose a claim. *United States v. Four Hundred and Twenty-four Casks of Wine*, 1 *Pet.* 547-550, 7 *L. ed.* 257.

Where a stranger to the suit, claiming to be the owner, gives a bond conditioned for the restoration of the property and to perform any other judgment which the court may render, and pay costs and damages, he makes himself a party to the suit as if process had been served on him, and is bound by a default, under the terms of his bond. *Briggs v. Taylor*, 84 *Fed. R.* 681-683, 28 *C. C. A.* 517-518.

The filing of a stipulation to release a vessel from an attachment, is not a waiver of any ground of defense to the suit, and respondent sued *in personam*, whose vessel is attached because personal service cannot be made in the district, may seasonably plead that the court has no jurisdiction of the cause. *Manchester v. Hotchkiss*, 10 *Am. L. R.* 379; *Fed. Cases*, 9,004.

Where several libels are filed amounting to more than the appraised value of the vessel, she may be discharged on claimants giving a stipulation in the full value of the vessel. *The Antelope*, 1 *Ben.* 521; *Fed. Cases*, 481.

Where several libels are filed against a vessel in the aggregate amount exceeding her value, she may be discharged upon a stipulation in the

amount of her value without including her freight, there being no proceedings against the freight. *The Vivid*, 3 *Biss.* 397; *Fed. Cases*, 16,977.

The stipulator cannot at his option be discharged from his undertaking on restoring the property to the custody of the court, nor can it be done by order of the court merely at the instance of the stipulator, and for his relief. *Livingston v. The Jewess*, 1 *Ben.* 19; *Fed. Cases*, 8,412.

Where another element of equity has been mingled with the case by the re-arrest of the property so that the claimant was deprived by an act of law of the benefit of the discharge, the stipulations may be vacated by the order of the court. *Ib.*

Under Rule 11 and sec. 941, *Rev. Stats. (U. S. Comp. Stats. 1901, p. 692)*, possession may be retained by giving bond where the libel is to determine the right of possession of the vessel. *The Poconoket*, 61 *Fed. R.* 106-109.

Where one of the owners has given a stipulation to refund the value of the ship as appraised, with damages, interest, and costs, he is not at liberty thereafter to insist that the ship is worth less than the appraised value, or that he has discharged other liens for which the owners were personally liable, to that extent diminishing its value. *The Virgin*, 8 *Pet.* 538-553, 8 *L. ed.* 1036.

The surety having paid the money stipulated may at once claim to be subrogated to the rights of the original libellant, but he is not entitled to be paid out of the proceeds of the sale of the ship in preference to the existing liens. *Carrol v. Leathers*, 1 *Newb.* 432; *Fed. Cases*, 2,455.

The surety is regarded only in the light of an ordinary creditor of his principal, upon whose personal credit he relied when he bound himself for the payment of the bond. It is his own fault if he has failed to exact from his principal a separate stipulation to indemnify him against all loss. *Ib.*

Although the rules are silent with regard to this form of stipulation, the court in general admiralty practice has the power upon the application of the surety to direct it to be given. *Ib.*

The surety has the right to proceed against the vessel seized and sold, as against any other property belonging to his principal, but it is the right of any ordinary creditor and not a privileged one, as holding a lien. *Ib.*

A surety by paying the decree does not become subrogated to the rights of the libellant so as to acquire a lien upon the vessel. If the surety desires protection he should exact security from his principal, as his legal redress is only that of one who has incurred obligations from having paid money for which he voluntarily and without consideration has undertaken to pay. *The Robertson*, 8 *Biss.* 180; *Fed. Cases*, 1,923.

The court may order a chartered ship to be delivered to her owners if the charterers refuse to claim her. *The Prometheus*, 1 *Lowell*, 491; *Fed. Cases*, 11,442.

A vessel discharged upon stipulation returns to her owner forever discharged from the lien, the foundation of the proceedings against her. The court has no power to order her re-arrest; but where the sureties become insolvent, may require new sureties to be furnished. *The Old Concord*, 1 *Brown's Adm.* 270; *Fed. Cases*, 10,482.

The rule allowing the re-arrest of a vessel discharged on stipulation in the case of fraud or an improvident release, only allows such re-arrest before judgment, because the cause of action after judgment has passed into *res adjudicata*, and the court is then without power in the cause. *The Hattie Bell*, 65 *Fed. R.* 119-120.

If a redelivery of a vessel is ordered it must be subject to all existing and subsequent accruing liens, and also to the rights of any *bona fide* purchaser, if a sale has in the meantime taken place. *The Union*, 4 *Blatchf.* 90; *Fed. Cases*, 14,346.

In cases of fraud, or the improvident discharge of a vessel, if seasonable application be made, she may be ordered back into the custody of the marshal. *Ib.*

The absence from the rules prescribed by the Supreme Court of any provision for the case of insolvent stipulators, is no reason why the court may not require the claimant to furnish new stipulators when the originals became insolvent. *The Virgo*, 13 *Blatchf.* 255; *Fed. Cases*, 16,976.

The death of one stipulator does not defeat the right of the libellant to execution against the survivor, which may be had without exhausting the remedy of the libellant against the claimant, where the decree adjudged the stipulants to pay into the court the amount of their stipulation. *The C. F. Ackerman*, 14 *Blatchf.* 360; *Fed. Cases*, 2,564.

The final decree where the *res* has been surrendered may be entered against both principals and sureties at the time of its rendition, upon a stipulation under sec. 941, *Rev. Stats. (U. S. Comp. Stats. 1901, p. 692)*. *Ex parte Warden*, 108 *U. S.* 153-156, 27 *L. ed.* 685.

It is no doubt within the power of the court to postpone a decree against the surety until after the time for appeal by the principal has expired and then to proceed only on notice, but it is not imperative. *Ib.*

The vessel should not be released during appeal in a cause of damage, nor will the court order the libellants to give bond to pay such damages

as may be sustained by the claimants by reason of her detention during the appeal in case the libel be dismissed in the appellate court. *The Adolph*, 5 *Fed. R.* 114-115.

Rule 11 was designed to give to the owners of vessels sued for damages, all practical relief against the hardships of exercising in good faith the right of arrest. *Ib.* 116.

Where two part owners appear by different proctors and one of the claimants signs the stipulation, the other who gave no stipulation will not be held liable by the decree. *The Zodiac*, 5 *Fed. R.* 220.

Rule 11 is designed for the purpose of securing the payment of pecuniary demands. It is not imperative and should not be applied in those cases where the object of the suit is not the enforcement of money, nor to secure any payment of damages, but to take possession of the vessel herself, to prevent her violation of neutrality laws. *The Mary N. Hogan*, 17 *Fed. R.* 813-814.

Where the complaint is made under sec. 5,283, *Rev. Stats.*, the vessel should not be released on bond. *Ib.* 815.

A vessel may be sold before the final decree upon motion of claimant where the libellant does not oppose the application, the proceeds to be placed in the registry of the court and stand in the place of the *res*. *The Nevada*, 85 *Fed. R.* 681.

In admiralty there is no hard and fast rule to shut out proofs of mistake in valuation. Where a stipulation is voluntarily entered into without an appraisal as provided for by Rule 11, and where no person will suffer injury, admiralty will apply equitable principles to enable one who has by mistake furnished a stipulation, excessive, to correct the mistake. *The Iris*, 100 *Fed. R.* 104-114, 40 *C. C. A.* 301.

RULE XII

In all suits by material men for supplies or repairs, or
Suits by material men,
 against whom and what. other necessities, the libellant may proceed against the ship and freight, *in rem*, or against the master or owner alone, *in personam*.

Decisions

The general principles governing liens on domestic vessels stated to be: (1) By common law material men furnishing repairs to a domestic ship have no maritime lien upon the ship itself: (2) as to repairs or necessities in the port or State to which the ship belongs the local law governs, and no lien is implied unless by that law; (3) where the local

law gives a lien, the provisions of such law must be strictly followed, or no lien is acquired. *The Sue*, 137 *Fed. R.* 133-135.

The lien or supplies may be enforced against the person of the master, the vessel itself, or the owners thereof, whether the supplies be furnished with their knowledge or not; and this applies to foreign vessels in a neutral port. *North v. The Eagle, Bee*, 78; *Fed. Cases*, 10,309.

Where a State statute gives a lien on a vessel for repairs and supplies furnished in her home port, the same presumption in favor of the master's authority to contract therefor on her credit arises as exists under the maritime law where repairs are furnished in a foreign port. *The Templar*, 59 *Fed. R.* 203.

Where a third party claims a lien prior and superior to that of the libellant under the provisions of the State statute, the admiralty court has no power in a proceeding *in rem* to decide it, and adjust the priorities in dispute. *The Steamer St. Laurence*, 1 *Black*, 522-531, 17 L. ed. 184, Dec. T., 1861.

A proceeding *in rem* upon the ground that the local law gives a lien where none is given by the maritime code, is inapplicable to our mixed form of government. *Ib.*

A State statute giving a lien is enforced in admiralty not as a right which the court is bound to enforce, but as a discretionary power, where no controversy beyond the limits of admiralty jurisdiction is involved. *Ib.* 530.

A court of admiralty has no jurisdiction of charges not of admiralty nor of a maritime nature, although a lien may be given therefor by the State statute. *Boon v. The Hornet, Crabbe*, 426; *Fed. Cases*, 1,640.

The lien given by a State law may be enforced *in rem* in admiralty, but it must be such a suit as the admiralty can entertain. *Ib.*

A maritime lien will not be enforced against *bona fide* purchasers or incumbrances, without notice, after failure to assert it within a reasonable time. *The Bristol*, 11 *Fed. R.* 156-162.

See cases cited on p. 162, where the lien has been held to be lost by delay.

A lien not enforced until more than two years after the supplies were furnished, was dismissed as against *bona fide* purchasers. *The Utility*, *Bl. & H.* 218; *Fed. Cases*, 16,806.

Admiralty has jurisdiction to enforce a lien for repairs made by ship carpenters upon a domestic vessel, although no such lien exists by the State law. *In re Kirkland*, 12 *Am. L. R.* 300; *Fed. Cases*, 7,842.

The local laws only furnish rules to ascertain the rights of parties, and thus assist in the administration of the proper remedy, where jurisdiction is vested in admiralty by the laws of the United States. *The Steamboat Orleans v. Phoebus*, 11 *Pel.* 175-184, 9 L. ed. 677.

"Necessaries," as used in Rule 12, mean those things which pertain to the navigation of a vessel, and are incidental thereto, i. e., those things which directly aid in keeping her in motion for the purpose of receiving, carrying, and delivering cargoes. *Hubbard v. Roach*, 2 *Fed. R.* 393-394.

The charge for supplies furnished by material men to foreign ships in our ports or to our ships in foreign ports is enforceable in admiralty. *The Nestor*, 1 *Sumn.* 73; *Fed. Cases*, 10,126.

The ports of other States are foreign ports. *Ib.*

The fact that the master and owners are personally liable for the supplies does not destroy the lien. *Ib.*

Giving credit for a fixed time does not extinguish the lien for supplies, but no lien can be maintained until the term of credit has expired. *The John Wallace, Jr.*, 1 *Spr.* 178; *Fed. Cases*, 7,432.

The maritime lien is waived by any act inconsistent with the intention to hold such lien, such as taking negotiable notes of the owner. *The Chusan*, 1 *Spr.* 39; *Fed. Cases*, 2,716.

Entries in a ledger, the daybook entries not appearing, charging owners rather than the vessel, *Held*, not to displace the lien, as the entries in books are always explainable, and the truth of the transaction can be shown independent of them. *The Patapsco*, 13 *Wall.* 329-334.

Where the supplies are furnished in a foreign port, the presumption of law is that the credit is given to the vessel. *Ib.* 334.

A note taken for the amount of supplies furnished for a vessel will not waive the maritime lien on the vessel unless so understood at the time. The note, however, must be returned or surrendered at the hearing. *The Eclipse*, 3 *Biss.* 99; *Fed. Cases*, 4,268.

A charterer to whom is given the possession and management of a vessel becomes the owner *pro hac vice*, and his contracts for supplies bind the vessel, though the general owner appoints the master and crew. *The India*, 16 *Fed. R.* 262-263.

If supplies are furnished a foreign vessel in a foreign port where by law such furnishing creates a lien on the ship, a court of admiralty in the United States will administer the foreign law as it would be applied

in the ship's home port, though such law differs from the American law. *The Maud Carter*, 29 *Fed. R.* 156-157.

Under Rule 12 all ships, domestic or foreign, are liable for repairs, supplies, or other necessities furnished at the expressed or implied request of the owner or master, in home ports as well as in foreign ports. *The Augusta*, 5 *Am. L. Term Rep.* 495; *Fed. Cases*, 647.

The employee of a contractor employed to repair a vessel has a lien thereon, unless the labor was performed with the notice that he must look to the contractor for payment. *Ib.*

Rule 12 as altered, places contracts for repairs and supplies for all ships, whether foreign or domestic, on an equality as to proceedings in admiralty. *The Selt*, 3 *Biss.* 344; *Fed. Cases*, 12,649.

Held, that the repairs made with the knowledge of the mortgagee create a lien which should be satisfied not according to priority of date, but upon equitable principles. *Ib.*

Admiralty jurisdiction does not authorize the courts to take cognizance of questions of property between the mortgagee and the owners of a vessel. *Bogart v. Steamboat John Jay*, 17 *How.* 399-402, 15 L. ed. 95.

The mortgagee has a right in admiralty to so much of the funds as is not required to pay prior liens. *The Island City*, 1 *Lowell*, 375; *Fed. Cases*, 7,109.

Liens created by the statute of a State for repairs or supplies furnished a vessel in her home port have precedence over a mortgage recorded under sec. 4,192, *Rev. Stats.* (*U. S. Comp. Stats.* 1901, p. 2,837), upon the principle that such supplies are furnished on the credit of a ship to preserve her existence for the benefit of all having any interest in her. *The J. E. Rumbell*, 148 *U. S.* 1-19, 37 L. ed. 345.

For necessary repairs or supplies furnished in a foreign port, a lien is given by the general maritime law. *Ib.*

For repairs or supplies in the home port, no lien exists under the general law independently of local statutes. *Ib.* 12.

Whenever the statute of a State gives a lien for repairs or supplies in her home port to be enforced *in rem*, such lien is in the nature of a maritime lien, and may be enforced in admiralty. *Ib.*

Such liens are within the exclusive jurisdiction of the courts of the United States sitting in admiralty. *Ib.*

NOTE.—This case reviews the decisions in the several circuits upon questions of priority of liens for supplies or repairs over mortgage liens.

State legislatures have no authority to create a maritime lien, nor can they confer jurisdiction on the State courts to enforce such lien by

a suit or proceeding *in rem* as practiced in the admiralty courts. *Edwards v. Elliot*, 21 *Wall.* 552-556, 22 L. ed. 487.

A maritime lien does not arise on a contract to build a ship or furnish material for that purpose, but State laws may create such liens and may enact reasonable rules and regulations for their enforcement not inconsistent with the exclusive jurisdiction of admiralty courts. *Ib.*

Liens granted by the State laws in favor of material men for necessities furnished to a vessel in her home port in the same State can only be enforced by proceedings *in rem* in the admiralty courts. *The Lottawanna*, 21 *Wall.* 558-580, 22 L. ed. 654.

All persons who are employed to repair a vessel or do work upon her are material men within the meaning of Rule 12. *City of Salem*, 10 *Fed. R.* 843-844.

The admiralty possesses a general jurisdiction in cases of suits by material men *in personam* and *in rem*, but where the proceeding is *in rem* to enforce a specific lien, the party must establish the existence of such lien. *The General Smith*, 4 *Wheat.* 438-443, 4 L. ed. 609.

Where a lien exists by maritime law of foreign jurisdiction, our admiralty has jurisdiction to enforce it here, even though all parties are foreigners. *The Maggie Hammond*, 9 *Wall.* 435-451, 19 L. ed. 772.

In the enforcement of a lien for supplies or repairs to a domestic vessel, the admiralty jurisdiction depends upon the local law of the State where such repairs are made, but questions of lien upon a foreign vessel are governed by the general maritime law. *The Chusan*, 2 *Story*, 455; *Fed. Cases*, 2,717.

By the general maritime law material men have a threefold remedy for supplies and materials furnished to a foreign ship: first, against the vessel; second, against the owner, and third, against the master; and none of the remedies is displaced except upon proof that exclusive credit was given to one of the parties or to the vessel. *Ib.*

Under Rule 12 every case of contract for supplies, repairs, etc., for a vessel, domestic as well as foreign, may be enforced by proceedings *in rem* against the vessel or *in personam* against the owner. *The Steamer Circassian*, 11 *Blatchf.* 472; *Fed. Cases*, 2,726.

The person who advances money on the credit of a foreign ship for the purpose of repairing her or furnishing her with necessary supplies, and which is used for that purpose, has a lien on the ship for such advance. *The J. F. Spenser*, 5 *Ben.* 151; *Fed. Cases*, 7,316.

Freight money received by a consignee is deemed to be applied to

the discharge of liens on the ship in the absence of an express application by the shipowner. *Ib.*

An action *in rem* is no bar to a subsequent suit *in personam* for the same claim, unless the defendants executed a stipulation for the amount of the claim. *Atlantic Mutual Ins. Co. v. Alexandre*, 16 *Fed. R.* 279-281.

A lien for wharfage upon a domestic vessel exists and is enforceable in admiralty. *The Kate Tremaine*, 5 *Ben.* 60; *Fed. Cases*, 7,622.

The maritime law implies a lien on the ship for every lawful contract of the master made for the benefit of the ship. *Ib.*

Supplies furnished in one State to a vessel belonging in another are supplies for a foreign ship, the different States in the United States for this purpose being held foreign to each other. *The Chusan*, 2 *Story*, 455; *Fed. Cases*, 2,717.

Contracts to furnish labor or materials for the repair of a vessel, whether made on the credit of the vessel or the personal credit of the owner or master, are maritime liens within the admiralty jurisdiction. *The Iris*, 100 *Fed. R.* 104-110, 40 *C. C. A.* 301.

It is not essential to a lien under a State statute which gives the lien to the one furnishing the labor or material for the repair of a vessel under a contract with the owner, that the repairs should be made with the understanding that the credit is given to the vessel. *Ib.* 112.

Where repairs have been furnished to a vessel, the burden is on the one claiming that the lien which arises by provision of law was waived, as by contract. *The L. X. B.*, 93 *Fed. R.* 233-239.

The mere giving of notes in payment of repairs to a vessel does not in itself create a waiver of the maritime lien therefor, even where the notes contain a provision rendering them an equitable chattel mortgage. *Ib.*

The notes not being paid, they may be returned and the lien enforced. *Ib.* 238.

RULE XIII

In all suits for mariners' wages, the libellant may proceed against the ship, freight, and master, or against the ship and freight, or against the owner, or the master alone *in personam*. Suits for wages, against whom and what.

Decisions

Unless restricted by a treaty the courts of the United States may assume jurisdiction of a lien for wages by a foreign seaman against a foreign vessel. *The Amalia*, 3 *Fed. R.* 652-653.

A vessel under charter is liable for the wages of seamen hired by the charterer, although the owner may not be personally liable therefor, *The Samuel Ober*, 4 *Fed. R.* 621-622.

The seamen's wages are nailed to the last plank of the ship, so also to the last fragment of the freight, and take precedence of bottomry bonds and all other claims. *Pitman v. Hooper*, 3 *Sumn.* 50; *Fed. Cases*, 11,185.

The right of the seaman to his wages is not affected by any private contract with regard to freight between the owner and the shipper. *Ib.*

A lien for seamen's wages attaches to the ship and freight into whosever hands they may come and takes priority over all others. *Brown v. Lull*, 2 *Sumn.* 443; *Fed. Cases*, 2,018.

Seamen have a paramount lien upon the freight earned by the ship, which may be enforced in admiralty by attachment of the freight money wherever found. *The Sailor Prince*, 1 *Ben.* 234; *Fed. Cases*, 12,218.

Seamen have threefold security for their wages, the vessel, the owner, and the master. *Bronde v. Haven*, *Gilp.* 592; *Fed. Cases*, 1,924.

Portions of a wrecked vessel saved through the efforts of seamen are subject to a lien on the proceeds for their wages. *Bracket v. The Hercules*, *Gilp.* 184; *Fed. Cases*, 1,762.

If they abandon the wreck the contract between them and the owners is dissolved and their privilege against the ship and claim for wages is lost. *Lewis v. The Elizabeth and Jane*, 1 *Ware*, 33; *Fed. Cases*, 8,321.

The policy of the law is to connect the right of wages with the safety of the ship. *Ib.*

All hands employed upon a vessel except the master are entitled to a lien if their services are in furtherance of the main object of the voyage. So fishermen employed in catching and preserving fish may proceed against the vessel for their wages, notwithstanding that they take no part in its navigation. *The Minna*, 11 *Fed. R.* 759-760.

The master of a vessel has no lien thereon for his wages. *Covert v. British Brig Wexford*, 3 *Fed. R.* 577-579.

The master may maintain a suit *in personam* for wages or for compensation in the nature of wages. *Hammond v. Essex Fire Marine Ins. Co.*, 4 *Mason*, 195; *Fed. Cases*, 6,001.

A seaman does not lose his lien on the vessel for wages by taking an order on the owner or charterer for a balance due at the close of the voyage. *The Eastern Star*, 1 *Ware*, 184; *Fed. Cases*, 4,254.

The lien can only be lost by the extinguishment of the debt by payment, or by that which the law regards as equivalent to payment. *Ib.*

The owner of a vessel, although his name is not stated in the ship's articles, is liable for the wages of the seamen. *Bronde v. Haven*, *Gilp*, 592; *Fed. Cases*, 1,924.

Under Rule 13 a vessel and her owner cannot be joined in the same libel for mariners' wages. *The Ethel*, 66 *Fed. R.* 340-342, 13 *C. C. A.* 504.

A claim for wages and a claim for money advanced for the use of the ship may be united in one action, and such claim may be sued in a joint libel with a person claiming wages only. *The Merchant*, 1 *Abb. Ad.* 1; *Fed. Cases*, 9,434.

Rule 13 prohibits joining a suit for wages against the owner personally with one against the vessel. *Ib.*

In no case, under Rules 12-20, can the ship and owner be joined in the same libel. *The Corsair*, 145 *U. S.* 335-342, 36 *L. ed.* 727.

Seamen's wages have preference over material men's claims. *The Steamboat America*, 16 *Law Reps. N. S.* 264; *Fed. Cases*, 288.

A lien for wages is not discharged by the sale of the vessel under execution. *Foster v. The Pilot*, *Newb. Ad.* 215; *Fed. Cases*, 4,980.

Security for costs is not required in suits for seamen's wages. *The Shelbourne*, 30 *Fed. R.* 510-511.

Under secs. 4,546 and 4,547, *Rev. Stats. (U. S. Comp. Stats. 1901, p. 3,087)*, suits to recover seamen's wages are cumulative and do not interfere with the right to recover by ordinary admiralty proceedings against the vessel. *The Schooner Edwin Post*, 6 *Fed. R.* 206-208.

A seaman who ships for the voyage has a lien for wages although the vessel does not make the contemplated voyage. *The Island City*, 1 *Lowell*, 375; *Fed. Cases*, 7,109.

A seaman who ships for a certain time but who is discharged by the master may sue for his wages at once, though the stipulated term of service has not expired. *The Cadmus*, 1 *Blatchf. & H.* 139; *Fed. Cases*, 2,280.

The Act of Congress, sec. 4,546, *Rev. Stats. (U. S. Comp. Stats. 1901, p. 3,087)*, has reference only to actions *in rem* and not to actions *in personam*. *Ib.*

A seaman may sue *in personam* for his wages as soon as the period of his service is completed. *Freeman v. Baker*, 1 *Bl. & H.* 372; *Fed. Cases*, 5,084.

A libel for wages is not defeated by an attachment of the same wages in a common-law court. *Bourne v. Ross*, 17 *Fed. R.* 703.

Under *Rev. Stats.*, sec. 4,546 (*U. S. Comp. Stats. 1901, p. 3,087*), no proceedings can be had against the vessel as a general rule until ten days after the right to wages has accrued, but proceedings may be had within the ten days, first, if a dispute has arisen; second, if the vessel has departed from the port of her discharge; third, if she is about to proceed to sea. *The William Jarvis*, 1 *Spr.* 485; *Fed. Cases*, 17,697.

In the last two cases the statute does not apply and the right to process is the same as if it had never been passed. *Ib.*

It is optional for the seamen either to proceed by summons to the master or to make direct application for admiralty process. *Ib.*

Where a commissioner, or justice of the peace, grants a certificate to show cause to recover wages, the judge may stay such proceedings or act on the petition *de novo*. *The Eagle*, 1 *Olc.* 232; *Fed. Cases*, 4,233.

The statute, sec. 4,546, *Rev. Stats. (U. S. Comp. Stats. 1901, p. 3,087)*, only prohibits the issuing of process against the vessel within ten days, not the filing of the libel. *Francis v. Basset*, 1 *Spr.* 16; *Fed. Cases*, 5,037.

A libel for seaman's wages will not be dismissed because prematurely brought, if substantial justice can be done under it. *The L. B. Snow*, 15 *Fed. R.* 282-284.

Special appliances on board a ship necessary for the proper conduct of its business are part of the ship's furniture and liable for seaman's wages and supplies, although they are owned by a third party. *The Edwin Post*, 11 *Fed. R.* 602-606.

The services of a ship's watchman rendered in the home port do not create a maritime lien. *The Brig E. A. Barnard*, 2 *Fed. R.* 712-720.

The services of a stevedore in loading a vessel do not create a maritime lien. *Ib.* 715.

Although the libellant describes himself as master if the facts show that he was a seaman, he may maintain a libel for wages. *The Imogen M. Terry*, 19 *Fed. R.* 463.

The lien of a mariner is personal and cannot be assigned so as to enable the assignee to enforce the lien in admiralty. *The Gate City*, 5 *Biss.* 200; *Fed. Cases*, 5,267.

Where those who claim to be seamen give credit personally to a third person, not the master or agent of the owners, but a charter party, the rule that all persons employed on a vessel for the purpose of the voyage have by law the legal rights of mariners should not be extended by implication or construction for their benefit. *The Sarah E. Kenedy*, 29 *Fed. R.* 264-268.

The law of the ship's home is applied by comity to regulate the mutual relations of the ship, her owner, master, and crew, as among themselves, their liens for wages and modes of discipline. *The Brantford City*, 29 *Fed. R.* 373-384.

Liens for reparation for wrongs done are superior to any prior liens for wages, money borrowed, pilotage, etc. *Norwich Company v. Wright*, 13 *Wall.* 104-122, 20 *L. ed.* 585.

A claim for an assault and battery by an officer of a ship cannot be joined in a libel *in rem* on a claim for wages. *The Guiding Star*, 1 *Fed. R.* 347-359.

RULE XIV

In all suits for pilotage the libellant may proceed against the ship and master, or against the ship, or against the owner alone or the master alone *in personam*. Suits for pilotage, against whom and what.

Decisions

Suits for pilotage on waters as far as the tides ebb and flow are within the admiralty jurisdiction. *Hobart v. Droган*, 10 *Pet.* 108-120, 9 *L. ed.* 363.

Admiralty has jurisdiction as well *in personam* as *in rem* for pilotage dues performed on, from, or to the sea. *The Anne*, 1 *Mason*, 508; *Fed. Cases*, 412.

Contracts for pilotage made by a duly authorized person in the employ of the owner are a lien on the ship. *Ib.*

A sum given by State statute as half pilotage to a pilot who first tenders his services, which are refused, is not a penalty, but is compensation under implied contract and may be enforced in admiralty. *Ex parte McNeil*, 13 *Wall.* 236-242, 20 *L. ed.* 624.

It is improper to join the ship and owner in one libel for pilotage and if seasonably objected to is a fatal objection. *Dean v. Bates*, 2 *Woodb. & M.* 87; *Fed. Cases*, 3,704.

RULE XV

In all suits for damage by collision, the libellant may
Suits for collision, against whom and what. proceed against the ship and master, or
against the ship alone, or against the
master or the owner alone *in personam*.

Decisions

The admiralty has jurisdiction in cases of tort and collision as well in our rivers where the tide ebbs and flows as on the high seas. *Waring v. Clark*, 5 *How.* 441-464, 12 L. ed. 226.

The jurisdiction of the admiralty courts of the United States extends to collisions between foreign vessels happening on the high seas. *The Belgenland*, 9 *Fed. R.* 576.

A seaman permanently injured in the performance of his duty on shipboard, in consequence of the negligence of the master, may maintain a libel for the injury against the ship to recover damages. *The A. Heaton*, 43 *Fed. R.* 592-594.

It is the settled law of this country that a libel in admiralty may be maintained against the ship for any personal injury for which the owners are liable under the general law. *Ib.*

Admiralty has jurisdiction of a libel by a father to recover compensation for the death of a son killed in a collision. *The Garland*, 5 *Fed. R.* 924-926.

Where a State statute gives the administrator the right to recover for death caused by the wrongful act, neglect, or default of another, if the tort occurs upon navigable waters a libel *in rem* lies therefor. *Ib.* 927.

Unless a lien is given by the local law for damages incurred by loss of life, where by the local law a right of action survives to the administrator or relatives of the deceased, there exists no lien which may be enforced by proceedings *in rem* in a court of admiralty. *The Corsair*, 145 *U. S.* 335-347, 36 L. ed. 727.

If the local law delegates a right of action, the District Court may administer the law by proceedings *in personam*. *Ib.* 347.

Courts of admiralty of the United States have not exclusive jurisdiction of suits *in personam* growing out of collisions on navigable waters; sec. 563, *Rev. Stats.* (*U. S. Comp. Stats.* 1901, p. 455), saves to suitors the right of a common-law remedy where that law is competent to give it. *Schoolmaker v. Gilmore*, 102 *U. S.* 118-119, 26 L. ed. 95.

In a libel *in rem* if the case proved show a clear right for recovery against the person, the libellant will be permitted after the decree to amend the libel to introduce proper allegations *in personam*, and proceed thereon, where no surprise or advantage is taken against the defendant by means of such changes. *Steamship Zodiac*, 5 *Fed. R.* 220-223.

An amendment cannot be allowed to make the suit one *in rem*, and one *in personam* against the owner, if the suit is for damages under Rule 15. *Ib.* 223.

A libel *in rem* against the vessel and *in personam* against the master may be joined under Rule 15. *Newell v. Norton & Ship*, 3 *Wall.* 257-266, 18 L. ed. 271.

As printed in the text it reads "vessel and owner"; the word "owner" is evidently a misprint for "master."

The joinder in the same libel of a proceeding *in rem* against the ship and *in personam* against the owner in an action for damages by collision is not admissible under Rule 15. This rule provides that the proceeding may be, first, against the ship and master; second, against the ship; third, against the owner alone; fourth, against the master alone. *Ward v. Ogdensburg*, 5 *McLean*, 622; *Fed. Cases*, 17,158.

Proceedings may be had *in rem* or *in personam* successively in each way until full satisfaction is had. *Ib.*

Rule 15 should not be extended to restrict the right conferred of joining other parties allowed by Rule 59. *Joice v. Canal Boats*, 32 *Fed. R.* 553-554.

The mortgagee of a vessel injured or destroyed by a collision may be joined in a libel for damages resulting from the collision. *The Grand Republic*, 10 *Fed. R.* 398-399.

Where the collision arises from the negligence of the master, the ship is primarily, although not exclusively, liable. *Hale v. Wash. Ins. Co.*, 2 *Story*, 176; *Fed. Cases*, 5,916.

In a collision between a steamer and a sailing vessel the presumption is that the steamer is in fault. *Farr v. The Steamship Farnley*, 1 *Fed. R.* 631-633.

Whenever one vessel does damage to another within the admiralty jurisdiction, the offending vessel becomes hypothecated to the vessel and cargo sustaining the injury, to the extent of the damage occasioned, and the owner of the injured vessel has a maritime lien to the extent of the injury sustained, of equal rank with those of material men or lenders on bottomry. *The America*, 16 *Law. Rep.* 264; *Fed. Cases*, 288.

Suit may be brought by the underwriters for the loss of a vessel by collision before the insurance money is actually paid, if the owner in good faith intends to hold the insurer liable. *The Manistee*, 7 *Biss.* 35; *Fed. Cases*, 9,028.

In a collision case, the damages may include expenses of towing the injured vessel to a place of safety, costs of a survey, demurrage, and interest on various items of damage recoverable. *The Bulgaria*, 83 *Fed. R.* 312-314.

Where a collision takes place in a foreign port the rights of the parties depend upon the foreign statutes there in force, and if doubts exist as to the true construction of such statutes, the court will adopt that which is sanctioned by the courts of the place where the collision occurred. *Smith v. Condry*, 1 *How.* 28-33, 11 *L. ed.* 35.

RULE XVI

In all suits for an assault or beating on the high seas, or
Suits for assault, against elsewhere within the admiralty and
whom. maritime jurisdiction, the suit shall
be *in personam* only.

Decisions

Rule 16 precludes a seaman from maintaining a suit *in rem* to recover damages for alleged assaults and injuries inflicted by the captain. *The Lyman D. Foster*, 85 *Fed. R.* 987-988.

A seaman is entitled to damages against the master for assault (1) where personal violence is inflicted not excessive, but wantonly and without cause; (2) where there was provocation or cause, but the punishment was cruel or excessive; (3) usually where the punishment is inflicted with a deadly or dangerous weapon. *Forbes v. Parsons, Crabbe*, 283; *Fed. Cases*, 4,929.

The master is liable for an unjustifiable assault by an officer upon a seaman where he knew of the trespass and did not interfere to prevent it. *Hanson v. Fowle*, 1 *Sawy.* 539; *Fed. Cases*, 6,042.

Where injuries due to negligence were inflicted by the bite of a dog, on board the ship by consent of the master and owners, *Held*, the action was not within the terms of Rule 16, proceeding *in personam* but may be against the vessel for damages. *The Lord Derby*, 17 *Fed. R.* 265-266.

Where a master is prosecuted for assault upon a seaman he may justify or show in mitigation that the seaman was habitually careless,

disobedient, or negligent. *Pittingill v. Dinsmore*, 2 *Ware*, 212; *Fed. Cases*, 11,045.

The master's torts, involving the breach of a passenger contract, while acting strictly within the scope of his employment render the ship liable. *McGuire v. The Golden Gate*, 1 *McAll.* 104; *Fed. Cases*, 8,815.

The owner if not a participant is only liable for the actual damages upon a breach of passenger contract. *Ib.*

Admiralty has jurisdiction *in personam* over torts committed on the high seas, and a passenger may sue in admiralty the master for ill treatment and injuries received during the voyage. *Chamberlain v. Chandler*, 3 *Mason*, 242; *Fed. Cases*, 2,575.

The jurisdiction of admiralty as to torts is limited to torts committed on the high seas or on waters within the ebb and flow of the tide. *Thomas v. Lane*, 2 *Sumn.* 1; *Fed. Cases*, 13,902.

Where a tort is a continued act and partly committed on land and the remainder on the high seas, the jurisdiction of the common-law courts attaches to it. If the tort originates in a port and is not a complete and perfect wrong until the ship is at sea, it comes within admiralty jurisdiction. *The Yankee*, 1 *McAll.* 467; *Fed. Cases*, 18,124.

Admiralty does not entertain suits *in rem* for an assault, and in proceedings *in rem* for wages the libellant cannot join a claim for assault. *The Guiding Star*, 1 *Fed. R.* 347-348.

A claim for assaults cannot be litigated in a suit *in rem*, but where the libel contains a cause of action *in rem*, the court may treat the claim for assaults as surplusage. *The Falls of Keltie*, 114 *Fed. R.* 357-359.

A libel against the master and also against the ship may be maintained for injuries due to the fault or neglect of the master. *The City of Carlisle*, 39 *Fed. R.* 808-816.

RULE XVII

In all suits against the ship or freight, founded upon a mere maritime hypothecation, either Suits for hypothecation, against whom and what. express or implied, of the master, for moneys taken up in a foreign port for supplies or repairs or other necessities for the voyage, without any claim of marine interest, the libellant may proceed either *in rem* or against the master or the owner alone *in personam*.

Decisions

To make a valid hypothecation of the ship by the master the creditor must show that the advances were made for repairs and supplies necessary for effectuating the objects of the voyage, or the safety of the ship, and that they could not be procured otherwise than by such hypothecation. *The Aurora*, 1 *Wheat*. 96-103, 4 L. ed. 45.

A bond given to the consignee who had funds in hand is void. *Hurry v. The Ship John and Alice*, 1 *Wash. C. C.* 293; *Fed. Cases*, 6,923.

Where the claim is against the owner only and no privilege is given on the vessel, no necessity need be shown affirmatively. *The Grapeshot*, 9 *Wall.* 129-136, 19 L. ed. 651.

Where proof is made of necessity for repairs or supplies, or funds raised to pay for them by the master and of credit given the ship, a presumption will arise, conclusive in the absence of evidence to the contrary, of necessity for credit. *Ib.* 141.

Hypothecation of a ship can only be made in a foreign port. All ports other than that of the particular State of the United States where the vessel belongs are deemed foreign. *Burk v. The M. P. Rich*, 1 *Cliff.* 308; *Fed. Cases*, 2,161.

If the master has funds of his own, or of the owner, within his control, or if reasonably he can procure them on his own credit or that of the owner, or by advances on the freight, or passage money, he is not at liberty to resort to a bottomry bond. *Ib.*

Drafts for repairs were drawn by the master on the owner and expressed on their face that they were "recoverable against the vessel, freight, and cargo." *Held*, the drafts themselves did not create a lien on the vessel. *The Woodland*, 104 *U. S.* 180-181, 26 L. ed. 705.

The master can neither sell nor hypothecate the cargo except in case of urgent necessity, and then only for the benefit of the cargo, considering the situation in which it has been placed. *The Julia Blake*, 107 *U. S.* 418-426, 27 L. ed. 595.

The fact that money is advanced for necessities to a ship in her home port does not give the advancers a lien as against other attaching creditors. *The Brig E. A. Barnard*, 2 *Fed. R.* 712-717.

Where the master being the owner borrowed money while in the home port of the ship for repairs there made, and gave a written statement which was attached to a draft for the sum, the statement declaring that the lenders should have "beside the responsibility of the owner a lien on the ship and freight," *Held*, not a bottomry bond. *Ib.* 717.

RULE XVIII

In all suits on bottomry bonds, properly so called, the suit shall be *in rem* only against the property hypothecated, or the proceeds of the property, in whosoever hands the same may be found, unless the master has, without authority, given the bottomry bond, or by his fraud or misconduct has avoided the same, or has subtracted the property, or unless the owner has, by his own misconduct or wrong, lost or subtracted the property, in which latter cases the suit may be *in personam* against the wrongdoer.

Suits on bottomry bonds, when *in rem* and when *in personam*.

Decisions

A bottomry bond executed in a foreign country between foreigners will be enforced in the admiralty courts of the United States when the ship is within the United States territory. *The Jerusalem*, 2 *Gal.* 190; *Fed. Cases*, 7,293.

A master cannot pledge the vessel for repairs when the owners of the vessel are present at the place where the repairs are made, or when he has funds of the owners in his control. *Patton v. The Randolph*, 1 *Gilp.* 457; *Fed. Cases*, 10,837.

One part owner cannot take from the master a bottomry bond on the share of another part owner. *Ib.*

A valid bottomry bond may be made by the owners of a vessel citizens of the State in which is the home port of the vessel, in favor of citizens of the same State, as well as in a foreign port. *The Draco*, 2 *Sumn.* 157; *Fed. Cases*, 4,057.

The assignee of a bottomry bond may sue in admiralty in his own name or in the name of his assignor. *Burke v. The M. P. Rich*, 1 *Clif.* 308; *Fed. Cases*, 2,161.

RULE XIX

In all suits for salvage, the suit may be *in rem* against the property saved, or the proceeds thereof, or *in personam* against the party at whose request and for whose benefit the salvage service has been performed.

Suits for salvage, when *in rem* and when *in personam*.

Decisions

Under the Tucker Act of Mar. 3, 1887, conferring jurisdiction over certain claims against the United States upon the District Court, such court has jurisdiction to determine claims for salvage against the United States. *United States v. Cornell Steamboat Co.*, 137 *Fed. R.* 455-457, 69 *C. C. A.* 603.

Possession is not necessary to give validity to the lien for salvage services upon the property saved. *Eads v. The Steamboat Bacon*, 1 *Newb. Ad.* 274; *Fed. Cases*, 4,232.

The lien for salvage is enforceable against bailees of the property saved. *Gates v. Johnson*, 21 *Law Rep.* 279; *Fed. Cases*, 5,268.

Where property has been taken by virtue of a writ of replevin from a State court, the salvor may maintain a libel *in personam* against the owner for salvage. *Hudson v. Whitmire*, 77 *Fed. R.* 846-848.

A corporation existing for the purpose of wrecking is entitled to salvage although the persons in its employ have no share in it. *The Comanche*, 8 *Wall.* 448-474, 19 *L. ed.* 397.

Nothing short of a contract to pay a given sum for salvage services to be rendered, or a binding engagement to pay at all events whether successful or unsuccessful, will bar a meritorious claim for salvage. *Ib.* 477.

If in fact a salvage service is rendered, it is none the less so because the compensation to be received is determined by the terms of an agreement by which the compensation is not to be paid at all events but is contingent upon success. *Ib.* 478.

A libel for salvage may be filed in the name of the master and owners, though the master disclaim any right. *The Blackwell*, 10 *Wall.* 1-11, 19 *L. ed.* 870.

Salvors may maintain a libel against the ship or cargo, or both, but a libel *in rem* against the vessel and *in personam* against the consignee of her cargo in the same suit, cannot be maintained. *The Sabine*, 101 *U. S.* 384-390, 25 *L. ed.* 982.

Mere employment to render salvage services is no bar to a libel therefor, the rule being that nothing short of a contract to pay a given sum for the services to be rendered, or a binding engagement to pay at all events whether successful or unsuccessful in the enterprise, will defeat the jurisdiction of the admiralty court. *Ib.* 390.

Suit must be by libel *in rem*, but an attachment may be either by

notice, or by actual levy on the property, such notice being by service upon the party holding the property, or its proceeds. *Snow v. 180¾ Tons of Scrap Iron*, 11 *Fed. R.* 517-519.

Under Rule 19 the joinder of proceedings *in rem* and *in personam* in the same libel for salvage is prohibited. There may be a joinder against both the vessel and cargo *in rem* or against the owners of the vessel and the owners of the cargo *in personam*. *Knott v. The Sabine*, 2 *Woods*, 211; *Fed. Cases*, 10,366.

A libel *in rem* and also *in personam* may be maintained for salvage, but the salvors can have but one satisfaction. *Brevoor v. The Fair American*, 1 *Pet. Adm.* 87; *Fed. Cases*, 1,847.

The question is still open as to whether in suits for salvage the suits may be *in personam* and *in rem* jointly. *Bondis v. Sherwood*, 22 *How.* 214-217, 16 *L. ed.* 238.

Under a contract for raising a sunken vessel for a stipulated sum the contractors cannot repudiate their contract and libel the vessel for salvage. *Ib.*

A suit in admiralty for salvage will not be stayed because an action of replevin between the owner and the salvor is pending in the State courts, wherein the lien for salvage may be determined. *A Raft of Spars*, 1 *Abb. Ad.* 291; *Fed. Cases*, 11,528.

Where the owners of a vessel entitled to salvage sue without joining the master and crew or in their behalf, the proper practice is to determine the amount to be awarded and to apportion it between the vessel, master, and crew. *The Steamer Leipsic*, 5 *Fed. R.* 108-114.

The court of admiralty has jurisdiction to compel contribution to the libellants who sue jointly, by one who has received entire salvage compensation to which all are jointly entitled. *McConnochie v. Kerr*, 9 *Fed. R.* 50-51.

It is not necessary to sustain an award for salvage, that the master and crew shall be utterly unable to extricate their vessel or that destruction must be certain but for the aid rendered; it is sufficient if there is great probability of loss without such aid. *The Dolcoath*, 15 *Fed. R.* 264-268.

A seaman cannot maintain a libel for compensation claimed for extra services rendered during stress of storm, or because of great peril encountered in saving the vessel from wreck. *Miller v. Kelly*, *Abb. Ad.* 564; *Fed. Cases*, 9,577.

A libel *in personam* against the master cannot be maintained without proof that the service was performed for his benefit. *Ib.*

The person incidentally benefited cannot be made liable under Rule 19 unless he has requested the salvage service or the service has been performed directly for his benefit. The remedy *in personam* is not confined to the legal owner of the property saved, but extends to one who has a direct pecuniary interest in such property. *United States v. Cornell Steamboat Co.*, 202 *U. S.* 184-193, 50 *L. ed.* 987.

A vessel belonging to a foreign government may be seized in admiralty when it is not employed in nor has yet formed any part of the public service of such foreign government, but is still in the hands of a private bailee. *Long v. The Tampico*, 16 *Fed. R.* 491-499.

The personal property of the United States subject to a lien for salvage cannot be seized when in actual possession of the United States authorities. *The Davis*, 10 *Wall.* 15-20, 19 *L. ed.* 875.

RULE XX

In all petitory and possessory suits between part owners In petitory and possessory suits, process, nature of. or adverse proprietors, or by the owners of a ship or the majority thereof, against the master of a ship, for the ascertainment of the title and delivery of the possession, or for the possession only, or by one or more part owners against the others to obtain security for the return of the ship from any voyage undertaken without their consent, or by one or more part owners against the others to obtain possession of the ship for any voyage, upon giving security for the safe return thereof, the process shall be by an arrest of the ship, and by a monition to the adverse party or parties to appear and make answer to the suit.

Decisions

Process under Rule 20 must be *in rem* and *in personam*. *The S. C. Ives*, 1 *Newb. Ad.* 205; *Fed. Cases*, 7,958.

An attachment of a vessel, in a common-law suit against the agents of the vessel, will not prevent a decree in favor of the owners in a petitionary suit. *The Taranto*, 1 *Spr.* 170; *Fed. Cases*, 13,751.

A part owner who disapproves of a voyage sanctioned by the other part owners may require security to the amount of his interest, con-

ditioned on the safe return of the vessel. *Fox v. Paine, Crabbe*, 271; *Fed. Cases*, 5,014.

Such security may be required although the part owner did not dissent to the voyage until after the vessel was nearly ready for sea. *The Marengo*, 1 *Spr.* 506; *Fed. Cases*, 9,066.

Where one joint owner leaves the ship in an unsafe condition, with no one in charge, and the other part owner takes possession, an admiralty court will not disturb such possession. *The Ocean*, 1 *Spr.* 535; *Fed. Cases*, 10,401.

A part owner may sustain a petitionary suit against a fraudulent possessor under a forged bill of sale, although the other part owner is not before the court. *The Friendship*, 2 *Curt.* 426; *Fed. Cases*, 5,123.

Under a charter which gave possession and control of the ship to the charterers for the term of three months, with no clause for re-possession on a breach of the contract, *Held*, that admiralty had no authority to decree the possession to the owners upon a libel alleging that the charterers had broken their contract. *The Prometheus*, 1 *Low.* 491; *Fed. Cases*, 1,142.

Where there is a dispute between part owners of a vessel, the court will not decree a sale of the whole boat upon the petition of the minority owners. *Lewis v. Kinney*, 5 *Dill.* 159; *Fed. Cases*, 8,325.

Doubted if the court has power to require a stipulation and ascertain the reasonable compensation for the value of the use of the minority interest, instead of the usual stipulation for the return of the vessel. *Ib.*

In possessory suits, a court of admiralty having jurisdiction of the principal cause of action, has also jurisdiction to decree an accounting between the parties as to the earnings and expenses of the vessel prior to filing the libel. *The Emma B.*, 140 *Fed. R.* 771.

Where a libel for partition of a vessel is filed, the court will not require that she be kept in custody, provided the respondent will give a proper bond for the return of the vessel. *Ib.* 770.

The right to a lien given by a State statute to persons furnishing supplies or labor for repairs to a vessel under contract with her master and part owner is not affected by the filing of a bill by other part owners for possession after the contract was made. *The Templar*, 50 *Fed. R.* 203.

Where there are funds in the registry of the court from the sale of a vessel in a possessory suit, the court has power to pay therefrom claims for repairs and supplies furnished the vessel. *Ib.*

The proper proceedings by the purchasers of a ship at a marshal's sale to obtain possession, where the ship is claimed to be wrongfully withheld, is by an arrest of the ship and a monition to the adverse party to appear and answer. *Blanchard v. The Cavalier*, 38 *Hunt Mer. Mag.* 325; *Fed. Cases*, 1,508.

The proceeding is *in personam*, the vessel being placed under attachment only for the purpose of being adjudged to the party who establishes his right to her. *Ib.*

The master may not refuse to deliver a vessel to her owners because he claims a lien upon her. *Muir v. The Brig Brisk*, 4 *Ben.* 252; *Fed. Cases*, 9,901.

RULE XXI

In all cases of a final decree for the payment of money, the libellant shall have a writ of execution, in the nature of *a fieri facias*, commanding the marshal or his deputy to levy and collect the amount thereof out of the goods and chattels, lands and tenements, or other real estate, of the defendant or stipulators.

Money decrees enforced by execution.

Decisions

The stipulation for the release of a vessel takes the place of the vessel. *The Fidelity*, 16 *Blatchf.* 569; *Fed. Cases*, 4,758.

Only those who have signed the stipulation given to release the vessel may be proceeded against by personal execution. *Atlantic Mutual Ins. Co. v. Alexandre*, 16 *Fed. R.* 279-282.

The phrase "defendants or stipulators" in Rule 21 refers to the judgment against one or the other according to the nature of the action, and not to a judgment against both jointly. *Ib.* 282.

Under Rule 21 execution goes against the stipulators on a decree against the principal, the sureties subjecting themselves by force of their undertaking to abide and fulfill the decree against the principal, and the execution issues without intermediate applications or delays. *Gaines v. Travis*, *Abb. Ad.* 422; *Fed. Cases*, 5,180.

No decree can be made for costs where a suit *in rem* is dismissed for want of jurisdiction. *The Lindrup*, 70 *Fed. R.* 718-719.

A court of admiralty has jurisdiction to enforce the decree of a foreign admiralty court at the instance of a party without letters rogatory. *Pennsylvania Ry. Co. v. Gilhooley*, 9 *Fed. R.* 618-619.

The fact that a decree upon a release bond is in excess of the penalty named in the bond does not deprive the court of jurisdiction. The judgment of the court is a nullity for the excess only. *Munks v. Jackson*, 66 *Fed. R.* 571-574, 13 *C. C. A.* 641.

The death of the claimant will not prevent a judgment against the surety upon the release bond. *Ib.* 574.

Where the decree of the lower court is confirmed on appeal no execution can issue until the entry of a formal decree of award. *Harris v. Wheeler*, 8 *Blatchf.* 81; *Fed. Cases*, 6,130.

There is no rule of practice in admiralty which requires notice of a final decree. *Gaines v. Travis*, *Abb. Ad.* 422; *Fed. Cases*, 5,180.

A decree for the payment of money must be enforced by execution as prescribed in Rule 21. The court has no power to enforce such a decree by sequestration, or punishment for contempt. *The Blanch Page*, 16 *Blatchf.* 1; *Fed. Cases*, 1,524.

Under Rule 21 an execution in the nature of a *fieri facias* issues on a final decree for the payment of money commanding the marshal to levy and collect the amount thereof out of the goods and chattels, lands and tenements, or other real estate of the defendants or stipulators. *Ward v. Chamberlain*, 2 *Black*, 430-435. 17 L. ed. 319.

Judgments and decrees rendered in the courts of the United States are liens on defendant's real estate in all cases where similar judgments or decrees of State courts are made liens by the law of the State in which the same are rendered. Decrees for the payment of money in admiralty suits *in personam* are similarly liens upon the land. *Ib.* 438.

Where no stipulation has been given for its payment when final decree has been rendered in favor of a libellant, and the execution cannot be levied upon corporeal property of the defendant because none is found, the court has power by supplementary proceedings to cause his rights and credits to be seized by attachment or garnishment, where property of that kind is subject to debts by the local law. *Lee v. Thompson*, 3 *Woods*, 167; *Fed. Cases*, 8,202.

RULE XXII

All informations and libels of information upon seizures for any breach of the revenue, or navigation, or other laws of the United States, shall state the place of seizure, whether it be on land or on the high seas, or on navigable waters within the admiralty

Informations and libels
on seizures, what to
state.

and maritime jurisdiction of the United States, and the district within which the property is brought and where it then is. The information or libel of information shall also ^{To propound grounds of forfeiture and have prayer for process.} propound in distinct articles the matters relied on as grounds or causes of forfeiture, and aver the same to be contrary to the form of the statute or statutes of the United States in such case provided, as the case may require, and shall conclude with a prayer of due process to enforce the forfeiture, and to give notice to all persons concerned in interest to appear and show cause at the return-day of the process why the forfeiture should not be decreed.

Decisions

The libel for forfeiture must be certain and particular in its averments of all the material facts which constitute the offense. *The Brig Caroline v. The United States*, 7 *Cranch*, 496-500, 3 L. ed. 417.

If informal, it may be amended by leave of the court. *Ib.* 500.

An averment that the vessel was "built, fitted or otherwise prepared or caused to sail," *Held*, bad for uncertainty as to which of the several illegal acts constitute the offense charged. *The Brig Caroline*, 1 *Brock*. 384; *Fed. Cases*, 2,418.

The libel to obtain a forfeiture must propound in distinct articles the various allegations of fact upon which the libellant relies, as grounds of forfeiture. 18,000 Gallons of Distilled Spirits, 5 *Ben.* 4; *Fed. Cases*, 4,317.

The government will not be compelled to elect which of several allegations in a libel it will rely upon to sustain a forfeiture. *Ib.*

The libel must aver specially all the facts which constitute the offense, but it may be amended even after reversal to supply substantial averments. *The Schooner Anne v. The United States*, 7 *Cranch*, 570-572, 3 L. ed. 442.

The fact and place of seizure must be averred in the libel or it will be dismissed at any stage of the proceedings. *United States v. One Raft of Timber*, 13 *Fed. R.* 796-799.

A general reference to the provisions of the statute offended against is not sufficient; there must be independent of this allegation a case stated which shows the law has been violated. The reference to the

statute may direct attention to the particular statute by which the prosecution is to be sustained, but forms no part of the description of the defense. *Schooner Hoppet v. United States*, 7 *Cranch*, 389-393, 3 L. ed. 380.

The same technical nicety required in indictments in common law is not required in an information for forfeiture.

It is sufficient if the offense be described in the words of the law and so set out that if the allegation be true, the case must be within the statute. *The Samuel*, 1 *Wheat*. 9-15, 4 L. ed. 23.

Matters which constitute a defense need not be alleged in the libel. *The Margaret*, 9 *Wheat*. 421-426, 6 L. ed. 125.

Jurisdiction depends upon the fact and place of seizure not upon the place where the offense was committed, and this seizure must be subsisting at the time the libel was filed. *The Anne*, 9 *Cranch*, 289-291, 3 L. ed. 734.

If a seizure be completely abandoned and the property restored by the voluntary act of the party who made the seizure, all rights under it are gone. *Ib.* 291.

Upon information of forfeiture against the vessel and her master jointly, the suit should be dismissed as to the master claiming the right to a jury trial, and proceeded with against the vessel. *United States v. The Queen*, 11 *Blatchf.* 416; *Fed. Cases*, 16,108.

In a libel of information, it is of no consequence whether the original grounds of seizure are sustained or not, if the goods are in point of law subject to forfeiture. The United States are not bound to the causes which influence the acts of the seizers. *Wood v. United States*, 16 *Pet.* 342-359, 10 L. ed. 987.

The libel of information may state the charge in the alternative, if each alternative constitutes an offense. *The Emily & Caroline*, 9 *Wheat*. 381-387, 6 L. ed. 116.

Where a vessel has been seized and released on bond, this fact may be pleaded in abatement to a subsequent libel in another district for other offenses committed during the same period. *The Haytian Republic*, 57 *Fed. R.* 508-512, 6 *C. C. A.* 465.

A libel may be amended to charge a fact not known to the libellor when the seizure was made. *Ib.* 511.

No action of trespass lies in a common-law tribunal while proceedings for forfeiture are pending. After an acquittal, an action of trespass against the officer may be maintained in the State court for the seizure, unless the acquittal was with a certificate of reasonable cause of seizure. *Gelston v. Hoyt*, 3 *Wheat*. 246-314, 4 L. ed. 382.

Where property is libelled as forfeited to the government, the sole

object of the suit is to ascertain whether the seizure be rightful and forfeiture incurred, or not. *Ib.* 314.

If it is condemned, the title to the property is completely changed. If it is acquitted, the taint of forfeiture is completely removed, and cannot be reannexed to it. *Ib.* 318.

If a seizure is made on the high seas or within the territory of a foreign power, the district court where the property is carried has jurisdiction to proceed *in rem* for a forfeiture. *The Merino*, 9 *Wheat.* 391-402, 6 L. ed. 118.

Informations under the revenue laws, and forfeiture of goods seeking no judgment of fine or imprisonment against a person, are civil actions, although so far in the nature of criminal proceedings that a general verdict on several counts in the information is upheld, if one count is good. *Snyder v. United States*, 112 *U. S.* 216-217, 28 L. ed. 697.

RULE XXIII

All libels in instance causes, civil or maritime, shall state the nature of the cause; as, for example, that it is a cause, civil and maritime, of contract, or of tort or damage, or of salvage, or of possession, or otherwise, as the case may be; and, if the libel be *in rem*, that the property is within the district; and, if *in personam*, the names and occupations and places of residence of the parties. The libel shall also propound and articulate in distinct articles the various allegations of fact upon which the libellant relies in support of his suit, so that the defendant may be enabled to answer distinctly and separately the several matters contained in each article; and it shall conclude with a prayer of due process to enforce his rights, *in rem* or *in personam* (as the case may require), and for such relief and redress as the court is competent to give in the premises. And the libellant may further require the defendant to answer on oath all interrogatories propounded by him touching all and singular the allegations in the libel at the close or conclusion thereof.

Decisions

A libel should always show the jurisdiction of the court by suitable averments. *Boone v. The Hornet*, *Crabbe*, 426; *Fed. Cases*, 1,640.

It is indispensable to found jurisdiction that the libel should state that the tort was committed at a place within the jurisdiction of admiralty. *Thomas v. Lane*, 2 *Sumn.* 1; *Fed. Cases*, 12,902.

Separate and distinct trespasses by several persons charged not jointly but severally cannot be joined in the same libel. *Ib.*

The libel should state the subject-matter in articles with certainty and precision, by averments admitting of distinct answers. *The Boston*, 1 *Sumn.* 328; *Fed. Cases*, 1,673.

The answer should meet every material allegation of the libel and either admit or deny or set up a defense to each averment. *Ib.*

No evidence is admissible except it is relevant to some of the allegations in the libel or answer. *Ib.*

A libel for a maritime tort must set forth by a distinct allegation each separate and distinct wrong on which the libellant intends to rely, and for which he claims damages, and proofs must be confined to the issues made by the libel and answer. *Pettingill v. Dinsmore*, 2 *Ware*, 212; *Fed. Cases*, 11,045.

In admiralty the rules of pleading do not require the technical accuracy necessary in courts of law. In admiralty there are no technical rules of variance or departure. Though a party cannot properly prove what is not properly alleged, yet the court having the whole matter before it where facts appear from proceedings properly had in the cause are bound to decree in accordance with the facts established. *The Prudence*, 204 *Fed. R.* 66.

In a libel for collision, Rule 23 requires a plain statement of the movements of the two vessels as they approached each other, their courses, the mode in which they were sailed and the circumstances of wind and tide where they have any bearing, and also the distinct statements of the acts which are claimed to have caused the disaster and of circumstances connecting the alleged faults and collision as cause and effect, so that they can be plainly understood. *McWilliams v. Steam Tug Vim*, 2 *Fed. R.* 874-875.

If the libellant sets forth a detailed statement of the movements of his own vessel he cannot be required to add averments as to other matters of detail upon which he does not intend to rely on the trial. *Virginia Home Ins. Co. v. Sundberg*, 54 *Fed. R.* 389-390.

A libel for injuries should state each distinct act of injury with reasonable certainty of time and place in separate statements. *Treadwell v. Joseph*, 1 *Sumn.* 390; *Fed. Cases*, 14,157.

It is not necessary to state any fact which constitutes a defense. *The Aurora v. United States*, 7 *Cranch*, 382-388, 3 *L. ed.* 378.

Where the vessel was in the district when the libel was verified, but had left when the libel was filed, and upon her return was duly served with process, it is a compliance with Rule 23, that the libel shall state that the property is within the district. *The Queen of the Pacific*, 61 *Fed. R.* 213-214.

Pleas and exceptions in admiralty must set forth the matter of defense in clear and definite terms, though it is not necessary they should embody the formalities of common-law pleas. *The Navarro*, 1 *Alc.* 127; *Fed. Cases*, 10,059.

Where a defense is put in by way of justification, it must admit the fact. *Treadwell v. Joseph*, 1 *Sumn.* 390; *Fed. Cases*, 14,157.

The burden of proof is on the respondent where a justification is pleaded. *Ib.*

The parties may be required to supply any defect in the pleadings at any stage of the cause by exceptions filed at the proper time. *The Havre*, 1 *Ben.* 295; *Fed. Cases*, 6,232.

Inserting the name of a party having no interest as a party libellant, while a variance that would be fatal in an action at law, is in admiralty an irregularity which will be disregarded. *Talbot v. Wakeman*, 19 *How. Pr.* 36; *Fed. Cases*, 13,731.

A mortgagee of a ship sunk by collision may be joined with the owners as libellants in an action against the offending vessel, as such mortgagee has an interest in the injured vessel sufficient to entitle him to seek relief in admiralty. Where jurisdiction of the *res* has been otherwise acquired in direct proceedings in admiralty, the mortgagee's interest in the *res* is recognized, and he may intervene for the protection of his interests either before or after the sale. *The Grand Republic*, 10 *Fed. R.* 398-400.

Where property of different parties is injured by a common disaster through the negligence of a carrier, the different shippers, or their assignees, may file a joint libel in admiralty to recover damages; in such case the demand of each libellant should be alleged in a distinct article. *Sun Mutual Ins. Co. v. Mississippi Valley Trans. Co.*, 14 *Fed. R.* 699-701.

A libel on a charter party should have attached thereto a copy of the charter on which the suit is brought. *Card v. Hines*, 33 *Fed. R.* 189.

The interrogatories annexed to a libel must be confined to the allegations of the libel. *Havermeyers & E. S. R. Co. v. Compania Trans. Espanola*, 43 *Fed. R.* 90. See note on page 91.

Answers to interrogatories propounded under Rule 23 are not strictly evidence in the cause in any different sense than that in which the pleadings are evidence. Such answers to interrogatories are designed as amplifications of the pleadings, so as to dispense with the taking of proof on the facts which may be admitted. *The Serapis*, 37 *Fed. R.* 436-442.

It is immaterial whether the answers to the interrogatories are made a part of the answer itself or separately. They are parts of the record, and, like the pleadings, may be referred to by either party. What is admitted needs no further proof, but as respects matters at issue, such answers are not affirmative proof in favor of the party making them. *Ib.* 442. But see the next case.

Each party in admiralty has a right to require the personal answers of the other under oath to any interrogatories touching the matter in issue. *The David Pratt*, 1 *Ware*, 509; *Fed. Cases*, 3,597.

If the defendant refuses to answer any interrogatory propounded by the libellant, the court will take the charges in the libel upon which they are founded as confessed. *Ib.*

Answers to special interrogatories are evidence. *Ib.*

Where claimants in their answer interpose new matter in avoidance of the allegations of the libel, the libellant may not propound interrogatories to the claimant thereafter, but should amend his libel upon application to the court, and attach thereto the desired interrogatories. *The Edwin Baxter*, 32 *Fed. R.* 296.

No citizen of the United States having a cause of action cognisable in a court of admiralty, can be denied the right to invoke the jurisdiction of our courts; and a citizen of the United States may sue in the Federal courts, a foreign ship upon a maritime contract, and in such suit the court will incidentally therein decide the claims of foreign co-libellants. *The Falls of Keltie*, 114 *Fed. R.* 357-359.

Where the libel is filed upon a shipping contract and also for its tortuous violation by the master, the case is not one in which the court will compel the libellant to elect which branch of the remedy he will pursue. He may pursue his claim in a joint action against the ship *in rem* and the master personally. *The Zenobia*, *Abb. Ad.* 48; *Fed. Cases*, 18,208.

RULE XXIV

In all informations and libels in causes of admiralty and maritime jurisdiction, amendments in matters of form may be made at any time, on motion to the court, as of course. And new counts

Amendments to libels,
etc., of course.

may be filed, and amendments in matters of substance may be made, upon motion, at any time before the final decree, upon such terms as the court shall impose. And where any defect of form is set down by the defendant upon special exceptions, and is allowed, the court may, in granting leave to amend, impose terms upon the libellant.

On motion.

When terms imposed on libellant.

Decisions

The allowance of amendments to a libel is within the discretion of the court. *Newell v. Norton*, 3 *Wall.* 257-266, 18 L. ed. 271.

The libellant may move to amend his libel when excepted to without submitting to the exception. *Towne v. Western Metropolis*, 28 *How. Pr.* 283; *Fed. Cases*, 14,114.

Amendments even in matters of substance are allowable until the termination of the cause; but where the opposite party would be prejudiced thereby an amendment will not be allowed. *O'Connell v. 1,002 Bales of Sisal Hemp*, 75 *Fed. R.* 408-409.

A supplemental libel may be allowed to stand as an original libel. *Henderson v. Three Hundred Tons of Iron Ore*, 38 *Fed. R.* 36.

A decree in admiralty may be altered to conform to the facts arising after the libel is filed. *The C. H. Foster*, 1 *Fed. R.* 733-735.

Where the amendment is not germane to the claim set forth in the original libel, it should not be allowed. *The Iona*, 80 *Fed. R.* 933-936; 26 *C. C. A.* 261.

After a libel has been filed for a collision and the usual stipulation, answer, and judgment given, other libels for damages arising from the same collision are deemed to be a new cause of action, and the court has no jurisdiction against the sureties, upon the stipulation given in the original libel. *The Oregon*, 158 *U. S.* 186-205, 39 L. ed. 943.

The mere change in the name of the libellant as substituting the real party in interest for a nominal party, does not release the sureties. *The Beaconsfield*, 158 *U. S.* 303-312, 39 L. ed. 993.

A libel may be amended after reversal, where defective for want of substantial averments. *The Schooner Anne v. United States*, 7 *Cranch*, 570-572, 3 L. ed. 472.

A libel may be amended in the appellate court so as to make a claim for damages because of a vexatious appeal. *Weaver v. Thomson*, 1 *Wall. Jr.* 343; *Fed. Cases*, 17,311.

If the cause of action is defectively stated in the libel, but it appears that the offense has been committed, the court on appeal will remand the cause with directions that the libel be amended. *The Mary Ann*, 8 *Wheat.* 380-390, 8 L. ed. 641.

The appellate court may allow amendments to the pleadings, either to the libel or to the answer, in order that the case may be properly heard. *The Morning Star*, 14 *Fed. R.* 866-867.

On appeal the court is cautious in admitting new matters of defense, where the matter must have been well known at the time of the hearing, or before. *Coffin v. Jenkins*, 3 *Story*, 108; *Fed. Cases*, 2,948.

Parties have a right to make any amendment in the appellate court, which is required to bring forward the merits of the case. But an amendment which introduces a new subject of controversy will not be allowed. *Houseman v. Schooner North Carolina*, 15 *Pet.* 40-50, 10 L. ed. 654.

Amendments will not be allowed to give jurisdiction to the appellate court where no jurisdiction existed when the trial was had and appeal taken. *Held*, in a cause where it was sought to amend by including interest, to give jurisdiction. *Udall v. Steamship Ohio*, 17 *How.* 17-19, 15 L. ed. 42.

An amendment will not be allowed making a suit *in rem* a suit *in personam* where the joinder of a claim *in rem* and one *in personam* is forbidden. *The Steamship Zodiac*, 5 *Fed. R.* 220-223.

A suit *in rem* cannot be turned into a suit *in personam* by amendment without further service of process, and claimant's consent. *The Monte A.*, 12 *Fed. R.* 331-335.

Where the proof makes out a case, but not the case alleged in the pleadings, the libel may be amended to introduce new allegations showing the actual facts. *The City of New Orleans*, 33 *Fed. R.* 683-685.

Where the merits clearly appear on the record, it is a settled practice in admiralty not to dismiss the libel, but to allow the party to assert his rights in a new allegation. *The Imogen M. Terry*, 19 *Fed. R.* 463-464.

The libel may be amended to pray for interest on the award in a collision case, after all the issues except the amount of damages have been determined. *The J. E. Trudeau*, 54 *Fed. R.* 907-912; 4 *C. C. A.* 657.

An amendment of a libel to increase the claim for demurrage should be denied, when the facts were known before the claim was presented, and the amount claimed has been named in a pleading three times verified, and the amendment was not asked until after the matter had been referred to the commissioners, after a decision in the cause. *New Haven Steamboat Co. v. The Mayor*, 36 *Fed. R.* 716-718.

Where no cause of action existed when the libel was filed, *Held*, that the proceedings being wholly defective should not be sustained through a supplemental libel, founded on matters arising subsequently; but a supplemental libel may be filed to be treated as an original libel as of that date. *Henderson v. Three Hundred Tons of Iron Ore*, 38 *Fed. R.* 36-40.

The fact that the property has been released on bail will not preclude a proper amendment of the libel. Rule 24 does not mean that in every case counts presenting new causes of action may be added, but leaves the matter to the discretion of the court to be exercised upon principles of justice. The general rule of pleading is unabated that amendments are always limited by due consideration of the rights of the opposite party, and where by the amendment he would be prejudiced, it is not allowed. *The Corozal*, 19 *Fed. R.* 655-656.

Where the *res* is the same, the tort and contract on which the claim for damages is based, are the same, and where the original libel contains all the facts and the parties that are necessary to amend by, the libel may be amended so as to allow a person who originally sued in her own right, to sue as guardian of her minor children. *The Manhasset*, 19 *Fed. R.* 430.

Where the cause of action set forth in the libel is for a tort, but the evidence establishes a cause of action upon contract, an amendment which will work no hardships to the defendant may be allowed, under the liberal practice of admiralty courts. *Davis v. Adams*, 102 *Fed. R.* 520, 523; 42 *C. C. A.* 493.

Amendments may be made in the appellate court to include claims rejected in the trial court because not specified in the pleading, provided the amendment is confined to the original subject of the controversy and not outside of the general scope of the pleadings. *The Charles Morgan*, 115 *U. S.* 69-76, 29 *L. ed.* 316.

RULE XXV

In all cases of libels *in personam*, the court may, in its discretion, upon the appearance of the defendant, where no bail has been taken, and no attachment of property has been made to answer

In libels *in personam*,
defendant to give se-
curity for costs, when.

the exigency of the suit, require the defendant to give a stipulation, with sureties, in such sum as the court shall direct, to pay all costs and expenses which shall be awarded against him in the suit, upon the final adjudication thereof, or by any interlocutory order in the progress of the suit.

Decisions

The court will not order the defendant to give stipulation to the action under pain of imprisonment in a case in which he is not liable to arrest. *Louisiana Ins. Co. v. Nickerson*, 2 *Low.* 310; *Fed. Cases*, 8,539.

It is the ordinary practice of admiralty to require a stipulation for costs from a respondent on entering his appearance and answering in an action *in personam*, although the process is a citation and not a warrant. *Rawson v. Lyon*, 15 *Fed. R.* 831-832.

The privilege to require a stipulation for costs may be waived by delay, and as all the obligations of the defendant to the libellants as to the manner of conducting the case are merged in the final decree, it is then too late to seek to require the respondent to file a stipulation for costs. *Pharo v. Smith*, 18 *How. Pr.* 47; *Fed. Cases*, 11,062.

RULE XXVI

In suits *in rem*, the party claiming the property shall verify his claim on oath or solemn affirmation, stating that the claimant by whom or on whose behalf the claim is made is the true and *bona fide* owner, and that no other person is the owner thereof. And, where the claim is put in by an agent or consignee, he shall also make oath that he is duly authorized thereto by the owner; or, if the property be, at the time of the arrest, in the possession of the master of a ship, that he is the lawful bailee thereof for the owner. And, upon putting in such claim, the claimant shall file a stipulation, with sureties, in such sum as the court shall direct, for the payment of all costs and expenses which shall be awarded against him by the final decree of the court, or, upon an appeal, by the appellate court.

In suits *in rem*, claim to be verified.

Oath by agent.

Claimant to give security for costs.

Decisions

A claimant in admiralty practice assumes the situation of a defendant as respects the libel, and as such may be required to answer the libel. *The Two Marys*, 12 *Fed. R.* 152-154.

A mortgagee whose mortgage is in default so that he is entitled to possession may appear as a claimant and obtain the discharge of the vessel from attachment by giving the usual bond. *The Jenny Lind*, 3 *Blatchf.* 513; *Fed. Cases*, 7,287.

To intervene and defend in admiralty *in rem*, the party must have a lien or a proprietary interest in the vessel seized which must be set out and verified in the claim and answer. *The R. W. Skillinger*, 1 *Flip.* 436; *Fed. Cases*, 12,181.

Where the claim is put in by an agent he must make oath that he is duly authorized thereto by the owner. *Ib.*

The objection to the right of a claimant to intervene in an admiralty cause must be taken by a proper exception before answer and replication and hearing upon the merits. If the right is not put in issue by preliminary exceptions, the libellant will be deemed to have admitted the claimant's right to contest. *Thomas v. Kosciusko*, 11 *N. Y. Leg. Obs.* 38; *Fed. Cases*, 13,901.

The owner of property sued *in rem* is not recognized until he comes in, claims, and defends. *The J. W. French*, 13 *Fed. R.* 916-918.

If the claim is not put in issue, and the libellant goes to hearing on the merits without an objection, it is an admission that the claimant had an interest in the property at the time of the answer, and the right to defend. *The Prindiville*, 1 *Brown's Adm.* 485; *Fed. Cases*, 11,435.

If a claim is made through an agent, the agent must make oath to his belief of the verity of the claim, and if necessary produce proof of his authority before he can be admitted to put in a claim. If this is not done it furnishes matter of exception. *United States v. 422 Casks of Wine*, 1 *Pet.* 547-549, 7 L. ed. 257.

The facts of the claimant's interest may be put in issue by exception, but if the claim is admitted without objection, and pleadings to the merits are put in, it is a waiver of the right to contest the claimant's interest, and an admission that the party is rightfully in court and capable of contesting the merits. *Ib.* 550.

If it should afterward appear that the property in suit belongs to a third person, the court may retain the property in its custody until the true owner can interpose a claim. *Ib.* 550.

Each article of the libel must be met by a distinct article in the answer, as no form of general issue is allowable, and the verification should be that the statements made by the respondent in the answer are true, or that they are true according to his information and belief. A verification in the form that the party believes so and so, is improper. *United States v. Twenty-five Barrels of Alcohol*, 10 *Int. Rev. Rec.* 17; *Fed. Cases*, 16,562.

If the owner desires to contest the liability of the ship for losses sued for, under Rule 26 he is required to give a stipulation for the costs regularly incident to the contest, including fees of the clerk, marshal, proctors, witnesses, etc., but not for the amount of the clerk's commissions. *The Vernon*, 36 *Fed. R.* 113-114.

RULE XXVII

In all libels in causes of civil and maritime jurisdiction, whether *in rem* or *in personam*, the answer of the defendant to the allegations in the libel shall be on oath or solemn affirmation; and the answer shall be full and explicit and distinct to each separate article and separate allegation in the libel, in the same order as numbered in the libel, and shall also answer in like manner each interrogatory propounded at the close of the libel.

Decisions

The answer is required to be on oath. *Gammell v. Skinner*, 2 *Gal.* 45; *Fed. Cases*, 5,210.

A plea to the jurisdiction must be verified by defendant himself and not by another on his behalf. *Teasdale v. The Rambler*, *Bee's Adm.* 9; *Fed. Cases*, 13,815.

The libellant is not bound to swear to the libel, but the answer must be sworn to by the respondent. *Coffin v. Jenkins*, 3 *Story*, 108; *Fed. Cases*, 2,948.

A special replication is only allowed upon order of the court to be filed as a cross-bill. *Ib.*

The rule of chancery courts that the answer of the defendant is equal to two disinterested witnesses, or one witness and countervailing circumstances, does not prevail in admiralty courts, even when the answer is responsive to interrogatories propounded. *Eads v. The H. D. Bacon*, 1 *Newb. Ad.* 274; *Fed. Cases*, 4,232.

Where respondent has no knowledge concerning the matter contained in any article of the libel, he may answer that he is ignorant thereof, but he should also state what his belief about the matter is. *The City of Salem*, 10 *Fed. R.* 843-844.

RULE XXVIII

The libellant may except to the sufficiency, or fullness, or distinctness, or relevancy of the answer to the articles and interrogatories in the libel; and, if the court shall adjudge the same exceptions, or any of them, to be good and valid, the court shall order the defendant forthwith, within such time as the court shall direct, to answer the same, and may further order the defendant to pay such costs as the court shall adjudge reasonable.

Libellant may except to answer.

Defendant when to answer over.

Decisions

The exceptions should specify whether taken for insufficiency or impertinence. An exception to an allegation for both causes, or one or the other of them, is bad. *The Whistler*, 13 *Fed. R.* 295-296.

An exception for insufficiency is allowed when the answer so far as excepted to is not a full and explicit response to the allegation or allegations of the libel; an exception for impertinence raises the question whether the answer is a response and defense to such allegation. *Ib.* 296.

A general exception as to the form of the answer will not be allowed. Exceptions should briefly and clearly specify the parts excepted to. *The Dictator*, 30 *Fed. R.* 699.

Exceptions to a libel or answer must be decided on the pleadings, and affidavits will not be considered. *The Prince Steam Shipping Co. v. Lehman*, 39 *Fed. R.* 704.

Where exceptions to an answer allege the ground of exception followed by specifications, the failure to sustain any specification will be fatal to the exception to which the specification is attached. *The Intrepid*, 42 *Fed. R.* 185-187.

Exceptions to pleadings in collision cases are permitted only when made in good faith for the sole purpose of obtaining a full statement of facts which the law requires. *Ib.* 188.

Where exceptions strike at the substance of the entire controversy, or where they object to mere errors of form and style of an answer, they

will be overruled. *New Haven Towing Co. v. City of New Haven*, 116 *Fed. R.* 762.

An allegation in an answer which serves no legal purpose, and is a mere slur upon the libellant, should be struck out on exceptions for impertinence. *The Pioneer*, 1 *Deady*, 58; *Fed. Cases*, 11,176.

The court will disregard exceptions of a formal nature first raised at the hearing. *Furniss v. The Magoon*, *Olc.* 55; *Fed. Cases*, 5,163.

Objections in the nature of a dilatory plea which do not go to the merits of the action will be deemed to be waived after an answer or claim filed. *Ib.*

A plea to the jurisdiction may be joined with an answer to the merits. *The Lindrup*, 70 *Fed. R.* 718-719.

Exceptions to a pleading in admiralty have the effect of a demurrer, and also that of a motion to make the pleading more definite and certain. *Quinn v. The Transport*, 1 *Ben. Adm.* 86; *Fed. Cases*, 11,516.

Where, in a collision case, the libellant states a bare cause of action and omits the full and frank narrative of the material circumstances attending the accident, an exception to the libel should be sustained. *Ib.*

RULE XXIX

If the defendant shall omit or refuse to make due answer to the libel upon the return-day of the ^{Defendant not answer-} process, or other day assigned by the ^{ing, libel taken pro con-} court, the court shall pronounce him to be in contumacy ^{fesso.} and default; and thereupon the libel shall be adjudged to be taken *pro confesso* against him, and the court shall proceed to hear the cause *ex parte*, and adjudge therein as to law and justice shall appertain. But the court may, in its discretion, set aside the default, and, upon ^{Default may be set} the application of the defendant, admit ^{aside.} him to make answer to the libel, at any time before the final hearing and decree, upon his payment of all the costs of the suit up to the time of granting leave therefor.

Decisions

Where the respondent refuses to answer interrogatories attached to or contained in the libel, the court will take the charges in the libel on which they are founded as confessed. *The David Pratt*, 1 *Ware*, 509; *Fed. Cases*, 3,597.

Where the defendant's neglect to answer the libel is due to ignorance of the practice of the court, any evidence which he may offer may be received by the court if in the ends of justice the rules of the court should be waived, so as not to operate as a surprise on the ignorance of a party and debar him from making a just defense. *Ib.*

If the rules of court do not allow this defense to be made by defendant's proctor, it may receive any proper evidence offered in the interest of justice by a proctor as *amicus curiæ*. *Ib.*

The effect of a default to appear in an admiralty proceeding is the same as in an action at law. It is a virtual confession. The default establishes the fact averred in the libel of information as effectively as it can be established on hearing, and warrants a decree if the libel contains the necessary averments. *Miller v. The United States*, 11 *Wall.* 268-303, 20 *L. ed.* 135.

Neither sec. 19, nor any other part of the Act of 1789 requires that there shall be a hearing after default in admiralty causes. *Ib.* 302.

Upon an application to vacate an order *pro confesso*, the respondent must satisfactorily account for laches, and exhibit either by answer or affidavit a meritorious defense. *Scott v. Young America*, *Newb.* 107; *Fed. Cases*, 12,550.

A decree *pro confesso* is not a final decree, but the court thereafter is to hear the cause *ex parte*, or may refer it to a commissioner to ascertain and report. *The Lopez*, 43 *Fed. R.* 95-96.

The case of *Miller v. The United States*, 11 *Wall.* 268, distinguished, and the rule in admiralty suits *ex contractu* held to be different. *Ib.* 96.

RULE XXX

In all cases where the defendant answers, but does not
Defendant when re-
quired to make further
answer. answer fully and explicitly and distinctly to all the matters in any article of the libel, and exception is taken thereto by the libellant, and the exception is allowed, the court may, by attachment, compel the defendant to make further answer thereto, or may direct the matter of the exception to be taken *pro confesso* against the defendant, to the full purport and effect of the article to which it purports to answer, and as if no answer had been put in thereto.

Decisions

No form of general issue is allowed to a libel, a libel of information, or an information. But each article therein must be met by an article in

the answer making a distinct issue on the matters alleged. *United States v. Twenty-five Barrels of Alcohol*, 10 *Int. Rev.* 17; *Fed. Cases*, 16,526.

The answer must admit or deny each allegation of the libel in order that the libellant may know what allegations he must meet. *The Dictator*, 30 *Fed. R.* 699.

An omission in an answer to notice an allegation of the libel does not admit it. *Ib.*

The libellant is entitled to an admission or denial of each distinct and separate averment in his libel, separately and distinctly. *Virginia Home Ins. Co. v. Sundberg*, 54 *Fed. R.* 389-390.

RULE XXXI

The defendant may object, by his answer, to answer any allegation or interrogatory contained in the libel which will expose him to any prosecution or punishment for crime, or for any penalty, or any forfeiture of his property for any penal offense.

What allegations defendant need not answer.

Decisions

Rule 31 is but an application of the provision of the Fifth Amendment of the Constitution, that no person shall be compelled in a criminal case to be a witness against himself, and the rule of the common law extending to cases of liability to a pecuniary forfeiture. *Pollock v. The Laura*, 5 *Fed. R.* 133-143.

The exemption provided by Rule 31 is equally applicable to a case where the defendant may expect the like evil consequences of an admission in the same suit, as to a case where his admission may be used against him in a criminal prosecution in some other suit or court. *Ib.* 143.

A corporation is entitled to the benefit of Rule 31. *Ib.* 143.

Held, in a proceeding for the offense of perjury, that since the passage of the Act of Feb. 25, 1868, sec. 860, *Rev. Stats.* (*U. S. Comp. Stats.* 1901, p. 661), providing that no answer or pleading of any party shall be used against such party, in any proceeding for the enforcement of any penalty or forfeiture, etc., that the general rule which excuses a witness from testifying where his answer may lead to some criminal charge against him, should be no longer upheld. *United States v. McCarthey*, 18 *Fed. R.* 87-89.

It is not necessary that a person should be personally before the court in order to avail himself of the privilege given by Rule 31. If a party

desires to avail himself of the privilege of not giving evidence of incriminating matter he must say so in unmistakable language and give the reason for excusing himself, and the privilege should be claimed after the party is sworn, so that his claim may be under the sanction of an oath. *In re Knickerbocker Steamboat Co.*, 139 *Fed. R.* 713-716.

RULE XXXII

The defendant shall have a right to require the personal answer of the libellant upon oath or solemn affirmation to any interrogatories which he may, at the close of his answer, propound to the libellant touching any matters charged in the libel, or touching any matter of defense set up in the answer, subject to the like exception as to matters which shall expose the libellant to any persecution, or punishment, or forfeiture, as is provided in Rule 31. In default of due answer by the libellant to such interrogatories the court may adjudge the libellant to be in default, and dismiss the libel, or may compel his answer in the premises, by attachment, or take the subject-matter of the interrogatory *pro confesso* in favor of the defendant, as the court, in its discretion, shall deem most fit to promote public justice.

Defendant may require answer of the libellant to interrogatories.

On default of same, libel may be dismissed.

Decisions

If the libel is evidently evasive and designed not to bring out in the pleadings the real points of the litigation, instead of clearly stating the case as required by Rule 23, the defendant may require specific charges by interrogatories attached to the answer, in order to ascertain and define the issues to be tried. *The Mexican Prince*, 70 *Fed. R.* 246-247.

Where the answer denied the facts alleged in the libel as a cause of action, *Held*, that interrogatories might be propounded to the libellant designed to obtain particulars of the claim sued on, and plaintiff is not entitled to a judgment on the pleadings while such interrogatories are unanswered. *The Oregon*, 116 *Fed. R.* 482-483, 53 *C. C. A.* 650.

Where the interrogatories addressed to the libellant attached to an answer or contained therein are wholly unanswered, the libellant is not entitled to judgment on the pleadings. *Ib.* 484.

Where the party interrogated refuses to answer, the court will take the charges in the pleading upon which the interrogatory is founded as confessed. *The David Pratt*, 1 *Ware*, 509; *Fed. Cases*, 3,597.

Each party has a right to require the answer of the other on oath upon interrogatories, touching the matter in issue. *Ib.*

In admiralty causes the practice of examining witnesses at any stage of the suit has always been sanctioned, because otherwise it would often be impossible to obtain the testimony of mariners, and others having no fixed domicile. *Flower v. MacGinniss*, 112 *Fed. R.* 377-378, 50 *C. C. A.* 291.

RULE XXXIII

Where either the libellant or the defendant is out of the country, or unable, from sickness or ^{Answer under oath, when waived or taken} other casualty, to make an answer to ^{under a commission.} any interrogatory on oath or solemn affirmation at the proper time, the court may, in its discretion, in furtherance of the due administration of justice, dispense therewith, or may award a commission to take the answer of the defendant when and as soon as it may be practicable.

RULE XXXIV

If any third person shall intervene in any cause of admiralty and maritime jurisdiction ^{Intervenor, how may come in.} in ^{rem} for his own interest, and he is entitled, according to the course of admiralty proceedings, to be heard for his own interest therein, he shall propound the matter in suitable allegations, to which, if admitted by the court, the other party or parties in the suit may be required, by order of the court, to make due answer; and such further proceedings shall be had and decree rendered by the court therein as to law and justice shall appertain. But every such intervenor shall be required, upon ^{To give stipulation for costs, etc.} filing his allegations, to give a stipulation, with sureties, to abide by the final decree rendered in the cause, and to pay all such costs and expenses and damages as shall be awarded by the court upon the final decree, whether it is rendered in the original or appellate court.

Decisions

A creditor who has acquired a lien by attachment, or any person claiming an interest in the thing in suit, may intervene and contest in a proceeding *in rem*. *The Mary Ann*, 1 *Ware*, 99; *Fed. Cases*, 9,195.

A mortgagee may intervene to protect his interest. *The Old Concord*, 1 *Brown's Adm.* 270; *Fed. Cases*, 10,482.

In a possessory suit material men cannot intervene to enforce a lien upon the vessel. *The Taranto*, 1 *Spr.* 170; *Fed. Cases*, 13,751.

Where there remains in court a sum of money subject to distribution, a party having a lien upon the property out of which the money was made which was legally fixed, may claim distribution, although the original demand was not such as could be sued for in admiralty. *Harper v. New Brig*, *Gilp.* 536; *Fed. Cases*, 6,090.

An underwriter who has accepted an abandonment and succeeded to the rights of the original claimant may intervene and control the suit. *The Ann C. Pratt*, 1 *Curt.* 340; *Fed. Cases*, 409.

Underwriters as such have no right to intervene in admiralty unless the property has been abandoned to them and accepted by them, so that they have an interest in the thing and not in the cause. *The Henry Ewbank*, 1 *Sumn.* 400; *Fed. Cases*, 6,376.

An intervenor is one who seeks merely to protect his own interests and have his claim paid out of the property in suit, or secured, before its delivery to another, and differs from a claimant who demands the possession or redelivery of the property in suit. *The Two Marys*, 12 *Fed. R.* 152-154.

Rule 34 has reference only to those cases where the vessel is still in custody, or where she has been sold and the proceeds paid into court. *The Oregon*, 158 *U. S.* 186-210, 39 *L. ed.* 943.

Others than intervening claimants are not entitled to file exceptions to a libel *in rem*. *Florence Cotton Oil Co. v. Alabama H. Co.*, 128 *Fed. R.* 915-918.

Rule 34 requires the court to pass upon the claim of an intervenor before he is given any standing in court. *The Clara A. M'Intyre*, 94 *Fed. R.* 552-556.

Where a vessel has been seized by State officers for a violation of law and a libel filed to recover possession, the State officers may appear

and answer the libel without giving the stipulation of sureties required by Rule 34. *Ib.* 561.

Insurance companies which have paid the loss may intervene at any time before the final distribution of the fund, to present their claim to an interest in the fund and its establishment by decree of the court. *Mason v. Marine Ins. Co.*, 110 *Fed. R.* 452-455, 49 *C. C. A.* 106. ,

Where the libel has been answered by an agent of the owners, the owners cannot afterwards raise a new issue by intervention, which if supported by proof would require the libel to be dismissed, where the original answer admitted the liability but only contested the amount, especially if no notice is given of the filing of such intervention, and no copy served on the proctor of libellants. *The Alexandra*, 104 *Fed. R.* 904-906.

In proceedings *in rem* where the *res* is in the custody of the law in the enforcement of a lien by one or more creditors, all other creditors may intervene by petition and have their claims allowed, and, if the claims stand in different ranks of privilege, paid according to their priority. *The Young Mechanic*, 3 *Ware*, 58; *Fed. Cases*, 18,182.

RULE XXXV

The stipulations required by the last preceding rule, or on appeal, or in any other admiralty or maritime proceeding, shall be given and taken in the manner prescribed by Rule 5 as amended.

Stipulations, before whom may be taken.

RULE XXXVI

Exceptions may be taken to any libel, allegation, or answer for surplusage, irrelevancy, impertinence, or scandal; and if, upon reference to a master, the exception shall be reported to be so objectionable, and allowed by the court, the matter shall be expunged, at the cost and expense of the party in whose libel or answer the same is found.

Exceptions, if allowed, matter to be expunged.

Decisions

Although new matter is sufficient as a defensive allegation or peremptory exception to the suit, it is impertinent to blend and confuse it with the response to the particular article or allegation of the libel. *The California*, 1 *Sawy.* 463; *Fed. Cases*, 2,312.

When it becomes necessary to insert in an answer some matter which cannot be pertinently introduced as responsive to any allegation in the libel, such matter must be separately stated in an article framed after the manner of an article in the libel. *Ib.*

If the answer contains matter not responsive to the allegations and interrogatories of the libel, and not constituting a defense thereto, it is impertinent, but if the answer is responsive to the allegations, it is not impertinent because the facts set out are not a defense to the suit. *Ib.*

When the answer fails to set up a full, explicit, and distinct response to the allegation or article of the libel which it professes to answer, it may be excepted to for insufficiency. *Ib.*

An exception on the ground that the libel "does not set forth any facts showing wherein this exceptor failed, neglected, or refused to carry out or perform the terms of said alleged contract" is in fact a demurrer, and if any part of the libel is good, the exception is bad as going to the whole libel. *Dennis v. Slyfield*, 117 *Fed. R.* 474-479, 54 *C. C. A.* 520.

Objections which are merely formal and do not go to the merits of the action, or merely allege that it is prematurely brought, cannot be taken on the final hearing. *Furniss v. The Magoon*, *Alc.* 55; *Fed. Cases*, 5,163.

After personally appearing in a cause and asking for affirmative relief by a cross-bill in a proceeding *in rem*, the defendants cannot object by exception that the cause is not such as to give admiralty jurisdiction. *The Fifeshire*, 11 *Fed. R.* 743.

Exceptions to an answer for insufficiency and impertinence cannot be joined in the same exception. *The Whistler*, 13 *Fed. R.* 295-296.

Where separate claims for salvage and towage services against different defendants are joined, the objection will be deemed to be waived, if no exceptions are filed before the cause is tried. *Merritt & Chapman D. & W. Co. v. Chubb*, 113 *Fed. R.* 173-176, 51 *C. C. A.* 119.

RULE XXXVII

In cases of foreign attachment, the garnishee shall be required to answer on oath or solemn affirmation as to the debts, credits, or effects of the defendant in his hands, and to such interroga-
Garnishee to answer on oath.

tories touching the same as may be propounded by the libellant; and if he shall refuse or neglect so to do, the court may award compulsory process *in personam* against him. If he admits any debts, credits, or effects, the same shall be held in his hands, liable to answer the exigency of the suit.

Refusing, may be arrested.

Decisions

Where a defendant has concealed himself or absconded, the process of attachment or garnishment may issue. *Manro v. The Almeida*, 10 *Wheat.* 473-492, 6 L. ed. 369.

The goods themselves if accessible may be attached, or the goods and credits in the hands of a third person may be attached by notice. *Ib.* 492.

The garnishee has a right to put in an answer. If the garnishee makes default the court requires some evidence to sustain the claim that he has debts or credits of the principal in his hands; but if the libellant without disclosure can upon default show that the garnishee holds debts, effects, or credits of the principal in his hands, he may have execution of them. *Shorey v. Reynolds*, 1 *Spr.* 418; *Fed. Cases*, 12,807.

After default the garnishee has no right to make answer that he had not when summoned debts, effects, or credits of the principal, and thereby discharge himself. *Ib.*

After default the libellant may have compulsory process against the garnishee to compel an answer. *Ib.*

By the former practice the libellant before answer under oath, might take upon himself the burden of proving assets to be in the hands of the garnishee, and that issue was tried without any answer. Rule 37 now makes it the absolute right and imperative duty of the garnishee to answer, so that the libellant now has no right to contest the answer of the garnishee. *Ib.*

On default of the garnishee the libellant may have process to compel him to answer. *McDonald v. Reynolds*, 21 *Law Rep.* 157; *Fed. Cases*, 8,765.

The libellant is not entitled to execution *in personam* against the garnishee. *Ib.*

Compulsory process will only issue to compel a garnishee to answer. *Ib.*

The answer of a garnishee is not conclusive as between two attaching creditors in a proceeding to try title to the fund in court. *Dent v. Radman*, 1 *Fed. R.* 882-888.

In disposing of a fund paid into the registry of a court, proof will be required of the right of the claimant or claimants. *Ib.*

RULE XXXVIII

In cases of mariners' wages, or bottomry, or salvage, or Property, etc., in hands of any person, how brought into court. other proceeding *in rem*, where freight or other proceeds of property are attached to or are bound by the suit, which are in the hands or possession of any person, the court may, upon due application, by petition of the party interested, require the party charged with the possession thereof to appear and show cause why the same should not be brought into court to answer the exigency of the suit; and if no sufficient cause be shown, the court may order the same to be brought into court to answer the exigency of the suit, and upon failure of the party to comply with the order, may award an attachment, or other compulsive process, to compel obedience thereto.

Decisions

Where a maritime lien exists and attaches upon proceeds, an admiralty court exerts its jurisdiction over them by way of monition to the parties holding the proceeds. *Sheppard v. Taylor*, 5 *Pet.* 675-677, 8 *L. ed.* 269.

The proper process in the first instance against a person not a party to the cause who has in his possession properties subject to the suit is a monition and not an execution. On the return of the monition the party may appear and justify himself, and bring all the matters before the court to be determined on the merits. *The Gran Para*, 10 *Wheat.* 497-500, 6 *L. ed.* 375.

The proper remedy in admiralty for a party holding a lien on freight is a libel against the freight. It is not necessary to make an assignor a party. The assignee may sue in his own name. *American Steel Barge Co. v. Chesapeake & Ohio C. A. Co.*, 115 *Fed. R.* 669-674; 53 *C. C. A.* 301.

The appropriate primary process is a monition to the holder of the bill of lading or owners of the cargo, requiring them to pay the freight into court. *Ib.* 674.

Rule 38 does not justify any proceeding against the cargo until after an order to pay the freight into court, unless in peculiar cases. *Ib.* 675.

Money not strictly the proceeds of the cargo but deposited by each consignee to cover the value of the cargo delivered but liable for con-

tribution for salvage, may be treated as a substitute for the cargo delivered and be required to be brought into court to be subject to a libel against the cargo for salvage. *The Queen of the Pacific*, 18 *Fed. R.* 700-702.

Where a cargo is arrested in admiralty proceedings against the freight, the owner of the cargo or consignee should pay into the registry of the court the freight admitted to be due. He cannot be compelled to give bail for the value of the cargo, and ought not to be allowed to give security for the freight under ordinary circumstances, but should pay the same into the registry and file his claim, and set up his right by answer. *The Freight Money of the Monadnock*, 5 *Ben. Ad.* 357; *Fed. Cases*, 9,704.

The paramount lien of seamen for wages will be enforced in admiralty upon freight money, although such money has been attached by the sheriff on proceedings in a State court. *The Sailor Prince*, 1 *Ben. Ad.* 234; *Fed. Cases*, 12,218.

That the consignee was garnisheed in a State court for the amount of the freight is no defense to a petition which seeks to bring the freight in admiralty, to answer in a suit to enforce a paramount maritime lien. *The Caroline*, 1 *Lowell*, 173; *Fed. Cases*, 2,419.

RULE XXXIX

If, in any admiralty suit, the libellant shall not appear and prosecute his suit, according to the course and orders of the court, he shall be deemed in default and contumacy; and the court may, upon the application of the defendant, pronounce the suit to be deserted, and the same may be dismissed with costs.

Libellant not appearing,
libel to be dismissed.

Decisions

A motion to open a default is discretionary under Rule 39 and is not reviewable on appeal. *Cape Fear Towing & T. Co. v. Pearsall*, 90 *Fed. R.* 535-537.

Since the claimant has an equal right under the rule to move the case, the libellant's delay in bringing the cause to a hearing after issue joined is not ground for its dismissal. *The Mariel*, 6 *Fed. R.* 831-832.

Where a suit is dismissed because the cause of action is not within the admiralty jurisdiction of the court, no costs can be awarded. *Reliance Lumber Co. v. Rothschilds*, 127 *Fed. R.* 745-749.

RULE XL

The court may, in its discretion, upon the motion of the defendant and the payment of costs, Decree against a defendant, when may be rescinded. rescind the decree in any suit in which, on account of his contumacy and default, the matter of the libel shall have been decreed against him, and grant a rehearing thereof at any time within ten days after the decree has been entered, the defendant submitting to such further orders and terms in the premises as the court may direct.

Decisions

A rehearing in admiralty cannot be had after the term at which the decree was made. *Hogg v. Pennsylvania Annex No. 3*, 38 *Fed. R.* 620-621; *The New England*, 3 *Sumn.* 495; *Fed. Cases*, 10,151.

Contra. An admiralty court has power to review its decree after the term at which the decree was passed. *Janvrin v. Smith*, 1 *Spr.* 13; *Fed. Cases*, 7,220.

A decree in admiralty is deemed to be enrolled at the term at which it is made. *The New England*, 3 *Sumn.* 495.

A libel in the nature of a bill of review in equity will lie after a final decree under similar circumstances as in equity. *Ib.*

To set aside a decree *pro confesso* the respondent must satisfactorily account for his laches and present by answer or affidavit a good defense. *Scott v. The Propeller Young America*, 1 *Newb. Ad.* 107; *Fed. Cases*, 12,550.

A court of admiralty will entertain a libel for review filed after the term has passed at which the decree complained of was rendered and after the decree has been executed, where actual fraud is charged, and a libellant without fault is otherwise without remedy. *Car Company v. Hopkins*, 4 *Biss.* 51; *Fed. Cases*, 10,334.

Where a cause was not tried until eight years after filing the libel, and in the meantime the claimant became insolvent and died, and the surety upon his bond had reason to suppose his liability extinguished and knew nothing of the decree rendered until after the expiration of time for appeal, a review of the decree after the term at which it was rendered will be allowed, especially where the testimony does not support the libellant's claim. *Jackson v. Munks*, 58 *Fed. R.* 596-600; affirmed, 66 *Fed. R.* 571.

The rule that a cause may not be reheard after the term at which it

was decided except upon a showing of fraud applies only to direct proceedings in the same cause, and not to an original suit. *Ib.* 599.

The court has no general power after the expiration of the term to set aside a final decree on the grounds of oversight or mistake. *The Illinois*, 1 *Brown's Adm.* 13; *Fed. Cases*, 7,003.

The time limited in Rule 40 is binding upon the court when once the period prescribed by the rule has passed, though it might be extended on application beforehand. *Ib.*

Where a default has been taken, the summary jurisdiction to rehear is limited to ten days, irrespective of the terms of court. *Snow v. Edwards*, 2 *Lowell*, 273; *Fed. Cases*, 13,145.

Although the term has passed in which the decree was rendered and after ten days in defaulted actions, the court has power to entertain a libel of review. *Ib.*

A default irregularly taken may be waived by defendant's subsequent appearance before the commissioners without objection. *Gaines v. Travis*, 1 *Abb. Ad.* 297; *Fed. Cases*, 5,179.

If the rules requiring notice have not been complied with, it is good ground for opening the decree and letting a party in to defend, but the decree is valid until set aside or reversed. *Daly v. Doe*, 3 *Fed. R.* 903-912.

A motion in the trial court for a rehearing on the ground of newly-discovered evidence will be denied where the parties are entitled as a matter of right to a new trial on appeal. *Mainwaring v. Bark Carrie Delap*, 1 *Fed. R.* 880-881.

A bill of review in an admiralty court is permitted in the absence of other remedy. Such bill of review may be filed to review a decree of an admiralty court after the term at which it was enrolled. It lies where in a suit *in rem* or *in personam* property has been disposed of without personal notice to the owner, and also where there has been fraud in the proceedings in the original suit, and where there has been fraud or misconduct by the purchaser, or in the sale. No usual limit of time, or other technical limitations should embarrass the court in detecting and correcting fraudulent proceedings in obtaining its decree. *The Columbia*, 100 *Fed. R.* 890-892.

An application for a rehearing in the appellate court made after the term when the final decree was entered comes too late. *The Comfort*, 32 *Fed. R.* 327-328.

RULE XLI

All sales of property under any decree of admiralty shall Sales to be by marshal,
proceeds to be paid into
registry. be made by the marshal or his deputy, or other proper officer assigned by the court, where the marshal is a party in interest, in pursuance of the orders of the court; and the proceeds thereof, when sold, shall be forthwith paid into the registry of the court by the officer making the sale, to be disposed of by the court according to law.

Decisions

It is the duty of the marshal to bring the proceeds of sales into court with his regular account. *The Avery*, 2 *Gal.* 308; *Fed. Cases*, 671.

Where the decree directs the officer to make sale and bring the proceeds into court, if the sale is made on credit and security given, the creditor may require that the security shall be brought into court. *Wallace v. Thornton*, 2 *Brock.* 422; *Fed. Cases*, 17,111.

The court has power to make sale of property in the custody of the collector of customs to secure the payment of duty in a libel to recover freight. Such sale being subject to the claims of the United States. *Two Hundred and Fifty Tons of Salt, etc.*, 5 *Fed. R.* 216-220.

A sale by proceedings *in rem* in admiralty in a court of competent jurisdiction extinguishes all liens upon the property sold, and vests a clear title in the purchaser. *The Trenton*, 4 *Fed. R.* 657-659.

Such sales may be impeached by showing that no jurisdiction of the subject-matter existed, that the sale was made by a fraudulent collusion, or was contrary to the principles of justice. *Ib.* 661.

The proceedings must be both fraudulent and collusive and the purchaser must be a party to the fraud. *The Garland*, 16 *Fed. R.* 283-286.

Where upon a sale had the purchaser obtains possession of the property without paying the price the court will enforce a redelivery of the property or the payment of the purchase money by summary process. *The Phoebe*, 1 *Ware*, 368; *Fed. Cases*, 11,066.

On a libel for freight where the claimant alleges a tender and pays into the registry of the court the amount tendered the libellant may have leave to take the money out of court, and proceed for the balance alleged to be due. *Higbee v. Ninety-Six Hundred Cases of Tomatoes*, 59 *Fed. R.* 783-784.

Under Rule 41 the court has jurisdiction to determine between claimants who have a right to or a lien on the *res*. Controversies between claimants involving breaches of contract or even equities, but which do not amount to a specific right in or to the *res* are not within its jurisdiction. *Miller v. The Peerless*, 45 *Fed. R.* 491-493.

In a case where the mortgagor had given the mortgagee an absolute bill of sale conditioned to pay certain indebtedness, upon a sale of the vessel under maritime liens, *Held*, that the right of the mortgagor was in no sense a right to the *res* in respect of the surplus. *Ib.* 493.

A court of admiralty has no jurisdiction to entertain an action to foreclose a mortgage; but when the court has a fund to dispose of, the proceeds of mortgaged property, it may entertain claims based on mortgages, to pass upon their validity and priority, and order such to be satisfied out of the funds in the registry of the court, subject to the paramount right of maritime liens and superior liens and claims. *The Katy O'Neil*, 65 *Fed. R.* 111-113.

Where petitioner has a (maritime) lien granted by a State law, such lien attaches to a surplus in the registry of the court, proceeds of a sale, and as between the lienor and owner he is entitled to be paid out of the proceeds. *Topfer v. Schooner Mary Zephyr*, 2 *Fed. R.* 824-826.

Where funds are in the registry of the court upon the sale of a vessel in a possessory suit parties holding claims for repairs and supplies furnished the vessel, who intervene, should be paid out of the proceeds in the registry of the court. *The Templar*, 59 *Fed. R.* 203-208.

As against the owner the court has no power to distribute the proceeds of a sale in payment of claims not maritime liens. *The Lydia A. Harvey*, 84 *Fed. R.* 1000-1001.

Where the party could not have proceeded against the property *in rem* he is not entitled to recover a portion of the proceeds in a case where the owner appears and opposes the application. *The Lottawanna*, 20 *Wall.* 201-224, 22 *L. ed.* 259.

The order in which liens are paid usually is: First, The costs of sale and of the keep or storage; second, seamen's wages, unless subject to prior claims for salvage; third, claims for towage and necessities furnished in a foreign port; fourth, claims for supplies and materials furnished at the home port, entitled to a lien under the State law; and, fifth, mortgages. *The City of Tawas*, 3 *Fed. R.* 170-172.

Maritime liens are entitled to be paid in preference to those under a State law. *Ib.* 174.

The court may require claimant to prove his right to any part of a fund in court. *Dent v. Radman*, 1 *Fed. R.* 882-891.

When several torts are of the same character, each arising out of negligence and each claimant arrests the vessel at the same time to respond, there is no principle of maritime law which requires an elder lienor not guilty of laches, and not having committed any waiver or abandonment to have his claim postponed to that of a younger lienor. *The Frank D. Fowler*, 17 *Fed. R.* 653-656.

Under maritime law priority in filing the libel does not give priority to the debt among creditors of the same rank and equal merit who intervene and prove their debts. *The Lady Boone*, 21 *Fed. R.* 731-732.

In the distribution of surplus moneys the court can only take cognizance of the lien upon the funds, that is, some vested legal or equitable interest in the *res* from which the fund was derived, as distinct from the claims of general creditors. *The Advance*, 63 *Fed. R.* 704-706.

A creditor at large, or a judgment creditor merely, has no such interest and cannot be heard to make a claim to the fund as against the legal owner. *Ib.* 706.

Claims for insurance premiums and moneys advanced for the operating expenses, and to disburse a ship at foreign ports, are not maritime liens and have no priority as against a mortgagee. *The Allianca*, 65 *Fed. R.* 245.

The principle applied to railway companies in the hands of a receiver, giving preference to certain wages and supply debts over a recorded mortgage, is not applicable to proceedings in admiralty. *Ib.* 246.

Upon an application to have the remnants remaining in the registry of court paid over to the receiver of an insolvent corporation, owner of the vessel, *Held*, such proceeds of sale after paying maritime liens would be turned over to such receiver rather than paid *pro rata* upon claims filed and found not maritime liens. *The Liberty*, 119 *Fed. R.* 539.

The claims of creditors before the court when a decree is made or when under the rules the parties before the court are entitled to a decree, take precedence of claims of prior dignity filed thereafter. *The Sealark*, 34 *Fed. R.* 52-53.

It is no objection to a resale of a vessel where a material increase has been offered, that the purchaser at the first sale has paid into court the sum bid and gone to expense by reason of such purchase. *The Sue*, 137 *Fed. R.* 133-134.

RULE XLII

All moneys paid into the registry of the court shall be
Moneys to be deposited, deposited in some bank designated by
and how drawn. the court, and shall be so deposited in
the name of the court, and shall not be drawn out, except

by a check or checks signed by a judge of the court and countersigned by the clerk, stating on whose account and for whose use it is drawn, and in what suit and out of what fund in particular it is paid. The clerk shall keep a regular book, containing a memorandum and copy of all the checks so drawn and the date thereof.

Decisions

Prior to distribution under final decree, if any part of the sum in the registry of the court is withdrawn without authority, the court by summary proceedings may compel its restitution and any person having an interest in such proceeds in the registry of the court is entitled to intervene by summary proceedings. *Osborne v. United States*, 91 *U. S.* 474-479, 23 *L. ed.* 388.

Where the court upon final decree has ordered the payment of a sum, proceeds of a libelled vessel, and the clerk has drawn a check for such amount, but before it is mailed an execution in the State court is served upon the clerk attaching all debts and credits of the payee in the check, *Held*, that the clerk holds the check in an official capacity, and that the fund is in the custody of the court and not subject to attachment or garnishment under process of another court. *In re Forsyth*, 78 *Fed. R.* 296-302.

RULE XLIII

Any person having an interest in any proceeds in the registry of the court shall have a right, Intervenor for proceeds, how to come in. by petition and summary proceeding, to intervene *pro interesse suo* for delivery thereof to him; and upon due notice to the adverse parties, if any, the court shall and may proceed summarily to hear and decide thereon, and to decree therein according to law Effect if claim dismissed. and justice. And if such petition or claim shall be deserted, or, upon a hearing, be dismissed, the court may, in its discretion, award costs against the petitioner in favor of the adverse party.

Decisions

Money in the registry of the court decreed to the libellant will not be appropriated to such libellant's debts upon the application of a creditor. *Brackett v. The Hercules*, *Gilp*. 184; *Fed. Cases*, 1,762.

Where there is a fund in court, parties entitled to such surplus, whether by State or Federal laws, and whether their claims are maritime

or not, may intervene and secure a distribution. *The Skylark*, 2 *Biss.* 251; *Fed. Cases*, 12,928.

A mortgagee cannot file a libel against the proceeds, but should apply by petition for a distributive share, if he has failed to appear as claimant to the libel filed against the mortgaged vessel. *Schuchardt v. The Ship Angelique*, 19 *How.* 239-241, 15 L. ed. 625.

The mortgage is subordinate to maritime liens given either by State or under maritime law. Its only standing in admiralty is against the balance in the registry by petition under Rule 43. *The Alice Getty*, 2 *Flip.* 18; *Fed. Cases*, 193.

The priority of a recorded mortgage under sec. 4,192, *Rev. Stats.*, Act of July 29, 1850 (*U. S. Comp. Stats.* 1901, p. 2837), announced in the cases of *The Grace Greenwood*, 2 *Biss.* 131; *Fed. Cases*, 5,652 and *The Skylark*, 4 *Biss.* 388; *Fed. Cases*, 12,929, declared not to exist, but that the lien for supplies and repairs given by a State statute takes precedence of such recorded mortgage. *The J. E. Rumbell*, 148 *U. S.* 1-19, 37 L. ed. 345.

Seamen and salvors are alone entitled to be paid before all libels and petitions for distribution of proceeds are heard and determined. *The Fanny*, 2 *Low.* 508; *Fed. Cases*, 4,638.

A salvor cannot proceed in admiralty to secure a contribution of a fund in court already decreed to be paid another salvor. *Sheldrake v. The Chatfield*, 52 *Fed. R.* 495-500.

Rule 43 does not allow one claiming no interest in a ship libelled to claim by petition a share of what the court may decree to the libellants, and by the summary methods of admiralty litigate a claim between petitioner and libellant. *Ib.* 500.

The court has power to distribute the surplus proceeds to all those who come in by petition under Rule 43 in the order of their several priorities, no matter how their claims originated, if they have a specific lien on, or vested right in, such surplus. *The Lottawanna*, 21 *Wall.* 558-582, 22 L. ed. 654.

Any person having a specific lien on, or vested right in, the proceeds may intervene by petition, although his claim requires the settlement of partnership accounts. *The L. B. Goldsmith*, *Newb.* 123; *Fed. Cases*, 8,152.

Where a vessel has been seized under a warrant of arrest and a notice given as required by Rule 9, upon a libel filed by a material man, other material men may intervene and proceed without further advertisement to enforce their liens, as the jurisdiction of the court is complete by the possession of the *res* first taken. *The Julia*, 57 *Fed. R.* 233-236.

Where a vessel has been libelled and sold in a suit for salvage and proceeds brought into court, *Held*, that the owner could not be permitted under Rule 43 to intervene for a delivery of the fund upon filing bond and stipulation before any proceedings for distribution of the fund were taken under Rules 57 and 58. Rule 43 refers to cases where a person claims such an interest in the proceeds in the registry of the court that entitles him to recover the whole or part thereof rightfully belonging to him without the necessity of further adjudication than that authorized and required by the rule.* *The Chief*, 142 *Fed. R.* 349-353, 73 *C. C. A.* 459.

While admiralty will distribute a fund among all claimants of equal degree without reference to priority of proceedings to enforce, yet where one has contributed nothing to establish the liability of a vessel for a collision and taken no part in a protracted litigation to that end he will not be allowed to share in the proceeds of the sale of such vessel until the claim of the party prosecuting the suit has been satisfied in full. *Woodworth v. Insurance Company*, 5 *Wall.* 87-89, 18 *L. ed.* 517.

RULE XLIV

In cases where the court shall deem it expedient or necessary for the purposes of justice, the court may refer any matters arising in the progress of the suit to one or more commissioners, to be appointed by the court, to hear the parties and make report thereon. And such commissioner or commissioners shall have and possess all the powers in the premises which are usually given to or exercised by masters in chancery on reference to them, including the power to administer oaths to and to examine the parties and witnesses touching the premises.

When court may refer matters to commissioners.

And powers of such.

Decisions

Where the validity of a bottomry bond is contested the court will order a reference to ascertain its particulars at the time and occasion upon which the advances were made by the obligees. *Furniss v. Magoon*, *Alc.* 55; *Fed. Cases*, 5,163.

After the court has determined the main questions in a controversy, it is proper to refer a case to a commissioner to take proofs of the nature, extent, and value of the services and credits claimed. *Shaw v. Collyer*, 18 *How. Pr.* 238; *Fed. Cases*, 12,718.

It is unnecessary to state the special reason for a reference to the clerk to take testimony as a commissioner. Such reference may be made

whenever the court deems it necessary or expedient. It is only necessary to state a special reason for the appointment of the clerk as a receiver or master. *The Wavelet*, 25 *Fed. R.* 733-734.

An exception to the commissioner's report goes to the merits of his decision and reaches no further than to bring before the court for consideration the adequacy of the grounds in law or fact upon which the report is founded. *The Columbus*, 1 *Abb. Ad.* 37; *Fed. Cases*, 3,041.

The exceptive allegation to a proceeding in a cause has in the civil law the character of a plea. It cannot be employed in admiralty practice to determine the regularity of the acts of an officer of the court not incorporated in and constituting a substantive part of the proceeding excepted to. *Ib.*

The propriety of the refusal of a commissioner to allow contradictory testimony to be given cannot be raised by an exception to his report. It should be raised by an application to the court before the report is made to direct the commissioner to allow the person to be sworn. *The E. C. Scranton*, 4 *Ben. Adm.* 127; *Fed. Cases*, 4,272.

Objection to the admission of evidence before a commissioner cannot be raised by exception to his report. *The Transit*, 4 *Ben.* 138; *Fed. Cases*, 14,138. But see next case.

When the commissioner excludes evidence offered by a witness about to go to sea or when the testimony may be lost if not then taken, the correctness of the rulings of a commissioner may be brought before the court for an immediate decision by means of a certificate of the commissioner as to his ruling. In the absence of such urgency the practice is for the commissioner to proceed to a report, which, with the evidence and his rulings upon objections taken to the admission of evidence, should be brought before the court upon the proper exceptions taken to his conclusions, and to such rulings of the commissioner as were objected to at the time. *The Beaver*, 8 *Ben.* 594; *Fed. Cases*, 1,200.

Held, that the case of *The Transit*, 4 *Ben.* 138, was not intended to decide that the correctness of the commissioner's rulings upon evidence should not be examined into after the report made. *Ib.*

A general exception to the amount found by a commissioner upon a reference is sufficient, where all the evidence taken is attached to the commissioner's report. *The Merritt & C. D. & W. Co. v. Morris & C. D. Co.*, 132 *Fed. R.* 154-155.

Where the cause is referred to a commissioner (for findings of fact and conclusions of law) by written consent of the parties, the same regard must be had for his findings as to those of a master in chancery. In such case his findings of fact and conclusions of law are to be treated as un-

assailable so far as they depend on conflicting testimony, or upon the credibility of witnesses; though not absolutely conclusive, if there is no testimony to support them. *The Elton*, 83 *Fed. R.* 519-521, 31 *C. C. A.* 496.

Where there is a conflict of testimony upon a question of fact, the court will adopt the conclusion of the commissioner unless there is a palpable preponderance of evidence against it. *Holmes v. Dodge*, *Abb. Ad.* 60; *Fed. Cases*, 6,637.

Where it appears from the commissioner's report that the testimony was in direct conflict and that the commissioner gave credit to one witness and discredited the opposing witness, it not appearing from collateral facts or circumstances that the decision of fact made by the commissioner should be changed, exceptions to his report should be disallowed. *Ib.*

The report of a commissioner should stand in respect to exceptions like exceptions to a jury trial, where they should be taken at a time and under circumstances where error can be easily corrected if urged and if not urged will be treated as waived. *The Eliza Lines*, 114 *Fed. R.* 307-313, 52 *C. C. A.* 195.

Rule 44 contemplates that proceedings before commissioners shall be under rules which govern masters in chancery in equity proceedings. Equity Rule 83 requires that parties file exceptions to the report of a master within a given time, and if none are presented within that time exceptions are waived and the report stands confirmed. *Ib.* 313.

By Rule 44 like powers are conferred upon commissioners acting upon references in admiralty proceedings as are usually exercised by masters in chancery in the equity courts, and their conclusions are given the same force and effect, and will not be disturbed unless it is apparent that there was a clear mistake in the process by which the conclusions were reached. *The Cayuga*, 59 *Fed. R.* 483-488, 8 *C. C. A.* 188.

The powers conferred upon a commissioner in admiralty causes are analogous to those of masters in chancery, and his findings upon questions of fact depending upon conflicting testimony or upon the credibility of witnesses will not be disturbed unless clearly erroneous. *La Bourgogne*, 144 *Fed. R.* 781-783, 75 *C. C. A.* 647.

The rule that the commissioner's findings upon questions of fact should not be disturbed unless plainly wrong, has little application where but little of the important evidence is taken by the commissioner. *Sovereign of the Seas*, 139 *Fed. R.* 812-815.

Findings of fact by a commissioner should be made in distinct paragraphs successively numbered. Exceptions thereto and briefs referring

thereto should refer to such paragraphs by numbers. *The Ataska*, 117 *Fed. R.* 885-893.

In an appellate court the decision of the trial court on questions of fact where the judge saw and heard the witnesses testify will have controlling weight, but an appellate court will more readily examine the evidence and reach its own conclusions thereon where the same is taken by an examiner. *The Sapho*, 94 *Fed. R.* 545-547, 36 *C. C. A.* 395.

Where the judge saw none of the witnesses and the controversy involves a sharp conflict of evidence the appellate court will examine the entire record. *Lazarus v. Barber*, 136 *Fed. R.* 534-535, 69 *C. C. A.* 310.

In admiralty causes all the testimony should be included. The District Court should admit all the testimony offered because the ultimate judgment must be made by the appellate court, which may have a different opinion in regard to the competency and materiality of testimony offered in the District Court; where, therefore, testimony tendered at the hearing in open court is objected to it should all be received subject to the objection, unless it is so utterly irrelevant and immaterial that there can be no possibility of any doubt about it. The power of the court to punish with costs useless testimony will ordinarily be a sufficient deterrent to such practice. *Minnesota S. S. Co. v. Lehigh Valley Co.*, 129 *Fed. R.* 22-30, 63 *C. C. A.* 672.

Where in an admiralty cause the testimony is heard by the court it should be taken down in writing, so the appellate court may pass upon both the law and facts. If there is no official stenographer, counsel should arrange therefor. *Neilson v. Coal, etc., Co.*, 122 *Fed. R.* 617-618, 60 *C. C. A.* 175.

The court has authority to direct the employment of a stenographer in the taking of testimony, and make the expense part of the taxed costs, where one of the parties refuses to consent to such employment. The practice is to have the parties stipulate for the employment of a stenographer where necessary and the court has failed to make a general or special order. *Rogers v. Brown*, 136 *Fed. R.* 813-814.

RULE XLV

All appeals from the District to the Circuit Court must
Appeals, when to be made while the court is sitting, or
made. within such other period as shall be
designated by the District Court by its general rules, or by
an order specially made in the particular suit; or in case no

such rule or order be made, then within thirty days from the rendering of the decree.

Decisions

Held, in the absence of any statute regulating the time for taking appeals, that under the Judiciary Act of 1789 provision was made for appeals from the Circuit Court to the Supreme Court, but no provision made for appeals from the District Courts to the Circuit Courts, except to the next Circuit Court; thus requiring appeals from the District Courts to be made only at the time of the decree or before the adjournment of the court or the term. An appeal three days after the court adjourned *sine die* not allowed. *Norton v. Rich*, 3 *Mason*, 443; *Fed. Cases*, 10,352.

There is no statutory provision to regulate either the mode of appeal from the District to the Circuit Court or the security to be given in order to stay execution on such appeal in admiralty causes. Prior to the act creating the Circuit Court of Appeals, all the statutory provisions upon these points were confined to appeals to the Supreme Court. *The Brantford City*, 32 *Fed. R.* 324-325.

In prize cases, *Held*, that an appeal to the Supreme Court from the District Court might be taken within thirty days after the final decree, whenever the purposes of justice required it. *Neustra Señora de Regla*, 17 *Wall.* 29-31, 21 L. ed. 596.

Where during the term a petition is filed to have the final decree opened and the petition is referred to a master, the time limited to take an appeal does not run until the court has acted upon the petition. *Brockett v. Brockett*, 2 *How.* 238-241, 11 L. ed. 251.

It is not necessary that all the defendants should join in the appeal bond, although all should join in the appeal. *Ib.* 240.

Where a decree is entered as of a prior date the rights of the parties in respect to appeal date from the actual entry and filing of the final decree. *Rubber Company v. Goodyear*, 6 *Wall.* 153-156, 18 L. ed. 762.

In garnishment proceedings in admiralty the first decree ascertaining the liability of the garnishees is interlocutory, and only after a final decree with an award of execution against the funds in their hands, can the garnishees take an appeal. *Cushing v. Laird*, 107 *U. S.* 69-76, 27 L. ed. 391.

The requirement of a District Court rule that the appeal be in writing is mere procedure, but if the District Court allow an appeal without writing, it does not affect the jurisdiction of the appellate court. *The S. S. Osborne*, 105 *U. S.* 447-450, 26 L. ed. 1065.

Cross-appeals must be prosecuted as other appeals or they will be dismissed. *Ib.* 451.

If the cross-libel is dismissed, a review of the decree of dismissal cannot be had until the original cause is determined; an order dismissing a cross-libel for want of jurisdiction is not a final decree within the rule that appeals lie only from final decrees. *Bowker v. United States*, 186 *U.S.* 135-142, 46 L. ed. 1090.

Appellants are not obligated to pay the sum awarded against them on appeal until the time when execution can issue on the decree, which is not until the expiration of ten days after the rendering of the decree, where the final decree provides for the award of execution, unless an appeal be taken within ten days after the entry of the decree. *The New Orleans*, 17 *Blatchf.* 216; *Fed. Cases*, 10,181.

Upon an appeal from the District to the Circuit Court, *Held*, that an appeal in admiralty has the effect to supersede and vacate the decree from which it is taken and that an entirely new trial with other testimony and other pleadings if necessary or asked for in the appellate court is contemplated, and that the decree made in the Circuit Court is to be enforced by that court where the record remains, and the District Court has nothing further to do with the cause. *The Lucille*, 19 *Wall.* 73-74, 22 L. ed. 64.

An appellant who recovered judgment below cannot take a nonsuit in the appellate court after the case is entered if the defendant objects. Where the appellant in an admiralty suit declines to prosecute his suit further, the court should give judgment upon the merits. *Folger v. The Robert Shaw*, 2 *Woodb. & M.* 531; *Fed. Cases*, 4,899.

A bill of exceptions *Held* not necessary to give the Supreme Court jurisdiction of an appeal from the Circuit Court, in admiralty, under the provisions of the Act of Feb. 16, 1875, 18 *Stat. L.* 315. *The S. C. Tryon*, 105 *U.S.* 267-270.

The findings which the statute requires must be stated by the court and become part of the record, and errors of law arising on them need not be presented by exceptions. *Ib.* 270.

Even after appeal a new allegation may be filed where cause is shown, and the appellate court will remand the cause to the Circuit Court to allow it to be done. *The Adeline*, 9 *Cranch*, 244, 3 L. ed. 720.

After an appeal from the District to the Circuit Court was taken, *Held* a motion to amend the pleadings so as to include a claim for damages growing out of the original cause of action, but rejected in the District Court because not specified in the pleadings, should be allowed. *The Charles Morgan*, 115 *U.S.* 69-75, 29 L. ed. 316.

The case of the *North Carolina*, 15 *Pet.* 40, holding that a libel could not be amended after an appeal so as to bring in a new claim for damages, was decided before the present admiralty rules were adopted. *Ib.* 76.

Upon an application in the Supreme Court for leave to amend the pleadings and introduce new testimony, that court refused to determine whether, since the Act of Feb. 16, 1875, new testimony could be taken in the Supreme Court after an appeal in admiralty, or amendments to the pleading be allowed under any circumstances. *The Merchants' Ins. Co. v. Allen*, 121 *U. S.* 67-73, 30 L. ed. 858.

The findings of fact in an admiralty suit have the same effect on appeal under the Act of Feb. 16, 1875, as a special verdict in an action at law. *The Maggie J. Smith*, 123 *U. S.* 349-352, 31 L. ed. 175.

Construing the Act of Feb. 16, 1875, it is settled: (1) That the facts found by the court below are conclusive; that the bill of exceptions cannot be used to bring up the evidence for a review of these findings; that the only rulings upon which the Supreme Court are authorized to pass are such as might have been presented by a bill of exceptions prepared as in actions at law, and that the findings have practically the same effect as the special verdict of the jury; (2) that it is only the ultimate facts which the court is bound to find and the Supreme Court will not take notice of a refusal to find the mere incidental facts, which amount only to evidence on which the ultimate fact was obtained; (3) if the court below neglects or refuses to make a finding as to the existence of the material fact established by uncontradicted evidence, or finds such a fact when not supported by any evidence, and an exception be taken, the question may be brought up for review on that particular. *The City of New York*, 147 *U. S.* 72-76, 37 L. ed. 84.

Under the Act of Feb. 16, 1875, the Circuit Court is bound to pass upon and find every material and ultimate fact necessary to a proper determination of the question of law, and in case of refusal to make such finding an exception may be taken thereto which will be considered upon appeal. *The E. A. Packer*, 140 *U. S.* 360-364, 35 L. ed. 453.

Where, in the opinion of the appellate court, the findings of the trial court are ambiguous, contradictory or incomplete or fail to establish a satisfactory basis for a decision, they will not be followed. *Ib.* 364.

The Supreme Court has jurisdiction of appeals from all final sentences and decrees in prize causes without regard of the amount in suit and without any certificate of the district judge as to the importance of the particular case. *The Paquette Habana*, 175 *U. S.* 677-686, 44 L. ed. 320.

By the Act of Mar. 3, 1891, establishing the Circuit Court of Appeals,

the entire appellate jurisdiction from the Circuit and District Courts of the United States was distributed according to the scheme of that act between the Supreme Court and the Circuit Court of Appeals by designating the class of cases of which each of these courts were to have final jurisdiction. *Ib.* 681.

NOTE.—But see *United States v. Dalcour*, 203 *U. S.* 408, 51 L. ed. 248, Oct. Term, 1906, in which the court announced that appeals might still be taken to the Supreme Court direct from the District Court in a certain other class of cases; holding the words in sec. 6 of the act, “unless otherwise provided by law,” applied to previous legislation, and not as it had theretofore held to contemporaneous and subsequent enactments.

Held, that sec. 631, *Rev. Stats. (U. S. Comp. Stats. 1901, p. 518)*, was not repealed by the Act of Mar. 3, 1891, and that the Circuit Court of Appeals has jurisdiction of causes in admiralty where the matter in dispute is less than the sum of fifty dollars (\$50.00). *No. American Trade & Trans. Co. v. Smith*, 93 *Fed. R.* 7–9, 35 *C. C. A.* 183.

Where a libel is ordered to stand dismissed if not amended within ten days, the prosecution of an appeal within that time is an election to waive the rights to amend, and the decree of dismissal takes place immediately. *The Three Friends*, 166 *U. S.* 1–49, 41 L. ed. 897.

An admiralty case may be reviewed by certiorari from the Supreme Court to the Circuit Court of Appeals, as well as by a direct appeal from the District or Circuit Courts, in the cases where such appeal is allowed directly. *Ib.*

The writ of certiorari to review causes pending in the Circuit Court of Appeals before final action by that court will only be issued under extraordinary circumstances. *Ib.* 49.

Upon a writ of certiorari from the Supreme Court to the Circuit Court of Appeals, the entire case is open for examination where the judgment of the trial court has been reversed, the case remanded for assessment of damages, and after assessment and decree a second appeal to the Court of Appeals upon the question of damages. *Panama Railroad v. Napier Shipping Co.*, 166 *U. S.* 280–284, 41 L. ed. 1004.

The decree of the District Court dismissing a libel upon motion of the claimant because no evidence had been submitted is not a final decree from which an appeal will lie. *The Delaware*, 33 *Fed. R.* 589.

In such case the remedy of the party, if he fails to procure the order of dismissal to be set aside and the cause to be reinstated, is to bring a fresh suit; the decree of dismissal is not conclusive between the parties. *The Merchant*, 4 *Blatchf.* 105; *Fed. Cases*, 9,436.

A decree establishing a maritime lien and awarding libellants a definite sum and directing that the vessel be sold and the proceeds paid into the registry of the court, is a final decree, upon which an appeal may be had. The fact that the proceeds are directed to abide the further order of the court, does not affect the finality of the decree. *The Eugene*, 87 *Fed. R.* 1001-1002, 37 *C. C. A.* 345.

Where no time is fixed by the general rule or special order of the trial court, within which the bond may be given, the appellant has thirty days under Rule 45 from the rendition of the decree to perfect his appeal. *The Canary*, No. 2, 22 *Fed. R.* 536.

Where an appeal has been taken by petition and citation and respondent has been served with notice and has appeared, the appeal has a standing irrespective of the bond, and where such respondent has participated in taking evidence in the appellate court, the appeal will not be dismissed because no bond or an irregular bond has been given. *The Natchez*, 27 *Fed. R.* 309-310.

Whether the Circuit Court had power to allow an amendment in an appeal process when the statement of the title of the action and parties thereto was defective, considered doubtful but not decided. *Ib.* 310.

Upon a judgment against a defendant and sureties, the defendant alone sued out a writ of error without joining the sureties and the appellate court dismissed the writ for the nonjoinder, *Held*, that the judgment of dismissal could be rescinded and the writ amended by inserting the names of all the judgment defendants. *Coasting Co. v. Tolson*, 136 *U. S.* 572-578, 34 *L. ed.* 539.

On the authority of the above case, *Held*, that the Court of Appeals upon proper petition filed in time should allow the sureties on a bond given for the release of a vessel to be made parties appellant. *The City of Naples*, 69 *Fed. R.* 794-795, 16 *C. C. A.* 421.

The time prescribed for appeals in Rule 45 is altered by the time given in sec. 11 of the Act of Mar. 3, 1891, authorizing appeals to be taken within six months. *Ib.* 795.

Sureties on a stipulation entered into under sec. 941, *Rev. Stats. (U. S. Comp. Stats.* 1901, p. 692), and Rule 11 are not parties to the suit in the sense that requires them to be joined in an appeal by the claimants whose sureties they are, unless upon the record it appears that some question arises touching the obligation of the sureties, or involving the terms of the stipulation bond; if any such question has been made, the sureties will have a right to be heard and take an appeal on any decree affecting their liability, otherwise they are not proper parties. *The New York*, 104 *Fed. R.* 561-563, 44 *C. C. A.* 38.

A decree entered in the District Court in pursuance of the mandate

from the Supreme Court may be reviewed on appeal to the Circuit Court of Appeals as to any matters not considered by the Supreme Court and left open by its mandate. *Ib.* 566.

Under sec. 11 of the Act of Mar. 3, 1891, the time allowed for appeals from the Circuit Court to the Court of Appeals is six months. *Ib.* 565.

The appellate jurisdiction of the Circuit Court was abolished by sec. 4 of the Act of 1891. *Ib.* 565.

Upon a decree in favor of several libellants by name for various sums and an appeal bond in favor of one, *Held*, the appeal was so defective that it gave no jurisdiction, and the court was without power to allow an amendment. *The City of Lincoln*, 19 *Fed. R.* 460-461.

Upon appeal by the libellant, *Held*, that the appeal opened the whole case, and that the party could not claim the benefit of the decree below, and, standing secure on that, try his fortune in the appellate court. *The Cassius*, 41 *Fed. R.* 367-368.

Where there has been a joint judgment against two defendants and one of the defendants fails to join in the appeal and is not served with summons and notice of severance, the appellate court cannot consider the appeal; and the defendant not appealing, cannot after the expiration of the time allowed for an appeal appear in the appellate court, waive the service of citation and make himself a party and thus perfect the appeal. *Consumers' Cotton Oil Co. v. Nichol*, 120 *Fed. R.* 818-819, 57 *C. C. A.* 321.

Unless all persons who appear to have an interest in the decree are made parties to the appeal or given notice to appear and join in the appeal or otherwise defend their interest, the appeal must be dismissed. *Grand Island, etc., Co. v. Sweeney*, 95 *Fed. R.* 396-398, 39 *C. C. A.* 127.

If the decree be joint in form but separable in fact, or law, the mere form will not make it such a joint decree as to require all those nominally joined in the decree to unite in appellate proceedings. *Hanrick v. Patrick*, 119 *U. S.* 156-163, 30 *L. ed.* 396.

The decree will not be dismissed where the transcript is not properly made up and certified because of a general confusion in the minds of all parties and the appellant is not solely to blame. *The Ethel*, 31 *Fed. R.* 576.

The Courts of Appeals of the First, Second, and Ninth Circuits have expressed the opinion that the Act of Feb. 16, 1875, does not apply to admiralty cases appealed from the District Court to the Court of Appeals. *The Philadelphian*, 60 *Fed. R.* 423; *The Avilla*, 48 *Fed. R.* 684; *The State of California*, 49 *Fed. R.* 172, 1 *C. C. A.* 224.

The question is undetermined in the Eighth Circuit. *Pioneer Fuel Co. v. McBride*, 84 *Fed. R.* 495-497, 28 *C. C. A.* 466.

In respect to admiralty cases the Court of Appeals stands in the relation of the Supreme Court to the Circuit Courts, and a cause brought from either the Circuit or District Courts comes into such court for review rather than for trial. *Ib.* 497.

The Act of Feb. 16, 1875, relieving the Supreme Court from deciding questions of fact in admiralty causes does not apply to the Circuit Court of Appeals. *The Coquitlam*, 77 *Fed. R.* 744-748, 23 *C. C. A.* 438.

The appellate court will not reverse a conclusion reached by the District Court on a controverted question of fact where the evidence is contradictory, unless it clearly appears to be contrary to the preponderance of evidence, and this notwithstanding the witness may not have testified in the presence of the court. *Ib.* 748.

In the Seventh Circuit it is held upon a review of the cases that the Act of Feb. 16, 1875, c. 77, 18 *Stat.* 315 (*U. S. Comp. Stats.* 1901, p. 525) which provided that Circuit Courts in admiralty causes might empanel a jury whose verdict, unless set aside, should on review by the Supreme Court be conclusive, on the issues of fact submitted, has no application to appeals in admiralty from the District Courts to the Circuit Court of Appeals. *The Nyack*, 118 *C. C. A.* 67-73.

Questions of fact and law involved in an admiralty appeal come to the Circuit Court of Appeals substantially as they do to the district judge. He may order a jury trial when either party so requests. Whether the verdict is binding or advisory only not decided.

The Circuit Court of Appeals may review the whole case as if it were originally brought there, except that as a general rule it will not reverse where the evidence is conflicting. *Ib.*

RULE XLVI

In all cases not provided for by the foregoing rules, the District and Circuit Courts are to regulate the practice of the said courts respectively, in such manner as they shall deem most expedient for the due administration of justice in suits in admiralty. Courts to regulate further practice.

Decisions

Statutes of limitation as such are not enforced in courts of admiralty, but such courts usually proceed in analogy to the statutes unless there is something exceptional in the case. *The Southwark*, 128 *Fed. R.* 149-150.

A court of admiralty will not follow the ruling of the Court of Appeals of New York that a foreign corporation cannot plead the State statute of limitations, when it appears the corporation has been continuously subject to the service of process within the State. *Davis v. Smokeless Fuel Co.*, 196 *Fed. R.* 753, 116 *C. C. A.* 384.

While admiralty courts are not bound by the conformity act, sec. 721, *Rev. Stats.*, (*U. S. Comp. Stat.* 1901, p. 581), yet they will follow a State statute of limitations by analogy in determining whether a claim is stale. *Ib.*

Counsel fees may be allowed to be taxed in a case where a fund is in court to be distributed, under the doctrine of *Trustees v. Greenough*, 105 *U. S.* 535. Where many libels have been filed by several different proctors the various claims should be consolidated, and one docket fee to each proctor is not an unreasonable allowance. *The Gordon-Campbell*, 131 *Fed. R.* 963-967.

Where a court of admiralty has distribution of a fund arising from the sale of a vessel and the maritime liens have been paid, the holder of a mortgage recorded under secs. 4192 and 4193, *Rev. Stats.*, (*U. S. Comp. Stats.* 1901, p. 2837), will be allowed to prove his claim and share in the fund according to the priority. *Ib.* 965.

While interest is allowed as a matter of right on claims arising out of contract, the allowance of interest in the way of damages in cases of collision and other cases of pure damage, as well as the allowance of costs, is in the discretion of the court. *Bethell v. Miller & Rittenhouse Co.*, 135 *Fed. R.* 445.

The power to require additional security where that previously given has become insufficient or worthless as also that of abating an exorbitant security, is one of the incidental powers of the court in regulating its practice and proceedings. *The City of Hartford*, 11 *Fed. R.* 89-90.

Proceedings required to obtain leave to maintain a suit *in forma pauperis* must conform to the provisions of the Act of July 20, 1892 (27 *Stat. L.* 252), although the rules of the court make different provision. *Donovan v. Salem & P. Nav. Co.*, 134 *Fed. R.* 316-317.

Where a proceeding *in rem* is instituted against a vessel and the vessel arrested and released upon the usual bond and surety, and after testimony taken the claimants objected to the jurisdiction of the court appearing on the face of the libel, it being apparent that no judgment *in personam* could be allowed in the cause, the subject-matter of the action being within the jurisdiction of admiralty, *Held*, that the libel could be amended to set out a cause of action *in personam* against the owner under the general power possessed by courts of admiralty, unless there

existed rules prohibiting remedies *in rem* and *in personam* in the same libel, or if the subject-matter of the original libel was without the jurisdiction of admiralty. *The Monte A.*, 12 *Fed. R.* 331-338.

Rule 46 recognizes the pre-existing powers of the court to regulate its practice in admiralty for the furtherance of justice. In collision cases a vessel sued alone is entitled to contribution, or an apportionment of damages against another vessel equally liable as a substantial right, and such contribution may be enforced by further process against the other vessel upon the petition of the one sued; such remedy being expedient, direct, and effectual, and not interfering with the rights of the libellant or imposing on him additional burdens or obligations on the trial, except to subject him to the liability of an appeal by more than one defendant. Therefore in collision cases, if a libel is filed against one vessel only the court may upon the petition of the vessel sued, award further process in the cause against another vessel to respond for its share of the damage. *The Hudson*, 15 *Fed. R.* 162-176.

Rule 46 gives the District Courts power to establish the practice of allowing a joinder of proceedings *in rem* and *in personam* upon a contract of affreightment and process *in rem* and *in personam* upon the same libel to issue. *The Planet Venus*, 113 *Fed. R.* 387-389.

In a case not provided for by the admiralty rules of the Supreme Court there is no fixed rule which prevents the joinder in one libel of causes of action *in rem* and *in personam*, where such course will promote the cause of justice and conduce to the convenience of the parties and of the court. *The Thomas P. Sheldon*, 113 *Fed. R.* 779-784.

If successive suits upon the same demand may be maintained *in personam* and *in rem*, until satisfaction is obtained, it is wholly a question of practice whether the two may be brought concurrently, or whether the second suit will not be allowed until the remedy in the first may be exhausted, to be determined with reference to the convenient administration of justice. *The Normandie*, 40 *Fed. R.* 590-591.

A libel to recover damages for a breach of warranty of seaworthiness and to recover possession of goods delivered under a charter party for transportation, may be joined in the same libel. *The Director*, 36 *Fed. R.* 335.

The practice in admiralty allows the joining of a number of claims of like character in one libel to avoid a multiplicity of suits. *The Queen of the Pacific*, 61 *Fed. R.* 213-214.

Thirty-eight separate claims for damages arising out of breach of contract of affreightment by failure to deliver merchandise described in several bills of lading, and for damages for injuries to the same,

claimed to have been occasioned by the negligence of the officers and crew of the vessel libelled, were joined in this suit.

The mode of proceeding allowed by Rules 12-20 is exclusive of any other in the cases to which they apply, but under Rule 46, in all other cases the court may proceed as may be deemed most expedient for the due administration of justice. *The Director*, 26 *Fed. R.* 708-711.

Under Rule 46, it is the general practice in admiralty procedure in a libel upon a contract of affreightment to proceed against the vessel and the master in one suit. *Ib.* 711.

While at law and even in equity a party may not sue A. and B. in one action, alleging that one of the two was liable, he did not know which, in admiralty, where the convenience of the court makes a joinder and trial of the plaintiff's claims at the same time desirable, a libel for a cause of action arising out of the same transaction against two parties in the alternative may be allowed. *Neall v. Curran*, 93 *Fed. R.* 831-832.

While the statutes of the United States limiting the liability of ship-owners cannot be resorted to to limit the liability of a foreigner, the United States courts of admiralty in a proper case are authorized to apply the rule of the general maritime law to determine the extent of liability of the owners of foreign vessels for collisions on the high sea. *Churchill v. The British America*, 9 *Ben.* 516; *Fed. Cases*, 2,715.

RULE XLVII

In all suits *in personam*, where a simple warrant of arrest issues and is executed, bail shall be taken by the marshal and the court in those cases only in which it is required by the laws of the State where an arrest is made upon similar or analogous process issuing from the State court.

And imprisonment for debt, on process issuing out of the admiralty court, is abolished, in all cases where, by the laws of the State in which the court is held, imprisonment for debt has been, or shall be hereafter abolished, upon similar or analogous process issuing from a State court.

Decisions

A surety in a stipulation in admiralty is exempt from a liability of imprisonment on execution in all cases where he would be exempt on like process issued from the court of a State in which the District Court is held. *The Kentucky*, 4 *Blatchf.* 448; *Fed. Cases*, 7,717.

If a defendant in the State court is exempt from personal arrest and imprisonment on all process whether *mesne* or final in cases sounding in contract, then the defendant in admiralty will in all such cases be in like manner exempt. *Ib.*

A person is imprisoned for debt who is arrested on *mesne* as well as final process. *The Bremena v. Card*, 38 *Fed. R.* 144.

Rev. Stats., sec. 990 (*U. S. Comp. Stats.* 1901, p. 709), and Rule 47, Clause 2, refer only to imprisonment for debt and do not affect the power of the court to issue a warrant of arrest to compel defendants to respond to a claim for unliquidated damages. The word "debt" in the statute does not include claims for unliquidated damages. *Bolden v. Jensen*, 69 *Fed. R.* 745-746.

The cases of *The Carolina*, 14 *Fed. R.* 424; *Chiesa v. Conover*, 36 *Fed. R.* 334; *The Bremena*, 38 *Fed. R.* 144, disapproved.

In an action for damages for personal injuries, *Held*, under Rule 47, that the bond given by the defendants, conditioned to render themselves amenable to the process of the court during the pendency of the action and to such as may be issued to enforce the judgment, was a sufficient bond, and that the parties could not be required to give a bond in the terms prescribed by admiralty Rule 3, where under the State laws a party arrested in a civil action was entitled to his discharge from arrest upon giving an undertaking in the form used. *Stone v. Murphy*, 86 *Fed. R.* 158-160.

RULE XLVIII

Rule 27 shall not apply to cases where the sum or value in dispute does not exceed \$50.00 dollars, *Qualification of Rule 27.* exclusive of costs, unless the District Court shall be of opinion that the proceedings prescribed by that rule are necessary for the purposes of justice in the case before the court.

All rules and parts of rules heretofore adopted, inconsistent with this order, are hereby repealed and annulled.

RULE XLIX

Further proof, taken in a Circuit Court upon an admiralty appeal, shall be by deposition, taken before some commissioner appointed by a Circuit Court, pursuant to the Acts of Congress in that behalf, or before some officer authorized to take depositions by the thirtieth section of the Act of Congress of

Further proof to be by deposition or upon oral examination, unless.

Sept. 24, 1789, upon an oral examination and cross-examination, unless the court in which such appeal shall be pending, or one of the judges thereof, shall, upon motion, allow a commission to issue to take such depositions upon written interrogatories and cross-interrogatories. When

Notification, by whom such deposition shall be taken by oral
and when to be served. examination, a notification from the

magistrate before whom it is to be taken, or from the clerk of the court in which such appeal shall be pending, to the adverse party, to be present at the taking of the same, and to put interrogatories, if he think fit, shall be served on the adverse party or his attorney, allowing time for their attendance after being notified not less than twenty-four

Time may be extended hours, and, in addition thereto, one day,
or diminished. Sundays exclusive, for every twenty

miles' travel; provided, that the court in which such appeal may be pending, or either of the judges thereof, may, upon motion, increase or diminish the length of notice above required.

Decisions

Under the Act of Mar. 3, 1891, establishing the Circuit Court of Appeals, appeals in admiralty lie direct from the District Court to the Court of Appeals. *The Havilah*, 48 *Fed. R.* 684-685.

A deposition taken subsequent to the appeal will not be considered at the hearing where the same witness testified in the District Court concerning the matters referred to in the deposition, and no grounds are shown for introducing such additional proof at the hearing on appeal. *The Sirius*, 54 *Fed. R.* 188-196, 4 *C. C. A.* 273.

New evidence may be introduced in the trial of an admiralty cause in the appellate court if material and competent, and if for any cause other than the fault of the party offering the same, such evidence could not be introduced upon the original trial. *Ib.*

Where it does not appear that a party was prevented from presenting the testimony to the trial court and was then informed as to its materiality and notified by the opposite party's motion to dismiss, that such testimony was necessary, he will not be allowed to present in the appellate court testimony taken on deposition, and if filed, the same will be suppressed. *The Lurline*, 57 *Fed. R.* 398, 5 *C. C. A.* 165.

Where the Court of Appeals has adopted the rule that its practice shall be the same as in the Supreme Court of the United States as far

as applicable, *Held*, that testimony sought to be introduced in the appellate court must be taken under a commission, which may only issue where the party shows that the testimony is material, and presents a satisfactory excuse for not taking the evidence before the trial court. *The Bechee Dene*, 55 *Fed. R.* 526-528, 5 *C. C. A.* 208.

The rules applicable to appeals from the District to the Circuit Court before Mar. 3, 1891, *Held*, not to govern appeals to the Court of Appeals. *Ib.* 528.

Where all prejudice resulting to the appellee because the testimony was not taken in the court below can be corrected in disposing of the costs of the case, and substantial justice requires the admission of testimony taken since the appeal, it will be received, although a satisfactory excuse for not taking the testimony in the lower court may not be shown. *Red River Line v. Cheatham*, 60 *Fed. R.* 517-520, 9 *C. C. A.* 124.

Parties should endeavor to procure in the first instance all the testimony material to the issues presented by the pleadings. The practice of bolstering up a lost cause by additional testimony ought not to be encouraged. *Pacific Steam Whaling Co. v. Grismore*, 117 *Fed. R.* 68-70, 54 *C. C. A.* 454.

In the Circuit Court of Appeals depositions taken after appeal were suppressed on the ground that it did not appear that the party was prevented from taking such testimony in the trial court except by his own choice; thereupon an application was made in the Supreme Court for leave to file a petition for writ of mandamus to the Court of Appeals directing the judges to receive such depositions and give them the consideration they were entitled to receive according to the practice in admiralty; *Held*, that the Supreme Court had no power to review the action of the Court of Appeals in suppressing the deposition, such action being an exercise of legitimate jurisdiction. *In re Hawkins*, 147 *U. S.* 486, 37 *L. ed.* 251.

Upon this application the question was raised, but not decided, whether new evidence could be taken in the appellate court as a matter of right, or the taking of such evidence could be restricted to applications made within a time prescribed by a rule of the Court of Appeals. *Ib.*

It must be shown that the evidence sought to be introduced in the appellate court was discovered when it was too late to produce it in the trial court, or that the witnesses had been subpoenaed and failed to appear and could not be reached by attachment, or other satisfactory excuse given, to entitle a party to examine witnesses on appeal. *The Mabey*, 10 *Wall.* 419-420, 19 *L. ed.* 963.

Commissions to take testimony under Rule 12 of the Supreme Court

were not of course, but only upon a formal application requiring a reasonable excuse for not taking the evidence in the court below. *Ib.* 420.

Where proper facts were set up by affidavit upon motion made, the commission was issued under Rule 12 of the Supreme Court to take testimony in a cause pending in that court on appeal, where some of the witnesses were alleged to have received a promise for the payment of a sum of money in the event the case was decided in favor of one of the parties. *The Western Metropolis*, 12 *Wall.* 389, 20 *L. ed.* 394.

Where it is claimed upon a motion for a rehearing that an issue upon a particular question was not raised in the pleadings, and that if such issue had been raised, the claimant had a good defense thereto, *Held*, that although the claimant had omitted to make showing of his defense in the court below, it was still open to him to bring this testimony to the attention of the appellate court under the admiralty rules relating to new testimony in that court. *Kenny v. Blake*, 125 *Fed. R.* 672-675, 60 *C. C. A.* 362.

RULE L

When oral evidence shall be taken down by the clerk of the District Court, pursuant to the above-mentioned section of the Act of Congress, and shall be transmitted to the Circuit Court, the same may be used in evidence on the appeal, saving to each party the right to take the depositions of the same witnesses, or either of them, if he should so elect.

When evidence taken down may be used on appeal.

Decisions

Rev. Stats., sec. 698 (*U. S. Comp. Stats.* 1901, p. 568), and admiralty Rules 49 and 50 require that proofs in the court of first instance be in some way reduced to writing in cases intended for review of the facts on appeal in the Circuit Court of Appeals. *The Philadelphian*, 60 *Fed. R.* 423-427, 9 *C. C. A.* 54.

The Act of Feb. 16, 1875, which takes from the Supreme Court the review of findings of fact in admiralty appeals is not applicable to the Circuit Court of Appeals; at least in so far as it receives appeals in admiralty from the District Court. *Ib.*

RULE LI

When the defendant, in his answer, alleges new facts, these shall be considered as denied by the libellant, and no replication, general or special, shall be filed, unless allowed or directed by the court on proper cause shown. But within

Replication not allowed.
—New matter in answer considered as denied.

such time after the answer is filed as shall be fixed by the District Court, either by general rule or by special order, the libellant may amend his libel so Libel may be amended, how and when. as to confess and avoid, or explain or add to, the new matters set forth in the answer; and within such time as may be fixed, in like manner, the defendant shall answer such amendments..

Decisions

Under Rule 51 evidence as to matters put in issue by either the libel or answer is properly received. *Moore v. The Robilant*, 42 *Fed. R.* 162-166.

Under Rule 51 where new facts are alleged by the defendant the libellant is authorized to amend his libel so as to confess and avoid, or explain, or add to new matter set forth in the answer, but he is not required to do so. *The Mexican Prince*, 70 *Fed. R.* 246-247.

Under the practice prior to the adoption of Rule 51, where the libellant merely intended to deny the truth of the allegations in the answer, a replication was not necessary, but when the allegations in the answer were admitted and intended to be avoided by new facts, the matter in avoidance was required to be put upon the record either by a supplemental libel or by replication. *Gladding v. Constant*, 1 *Spr. 73; Fed. Cases*, 5,468.

RULE LII

(1) The clerks of the District Courts shall make up the records to be transmitted to the Circuit Courts on appeals, so that the same Contents of records from District Courts. shall contain the following:

(i) The style of the court.

(ii) The names of the parties, setting forth the original parties, and those who have become parties before the appeal, if any change has taken place.

(iii) If bail was taken, or property was attached or arrested, the process of the arrest or attachment and the service thereof; all bail and stipulations; and, if any sale has been made, the orders, warrants, and reports relating thereto.

(iv) The libel, with exhibits annexed thereto.

(v) The pleadings of the defendant, with the exhibits annexed thereto.

(vi) The testimony on the part of the libellant, and any exhibits not annexed to the libel.

(vii) The testimony on the part of the defendant, and any exhibits not annexed to his pleadings.

(viii) Any order of the court to which exception was made.

(ix) Any report of an assessor or assessors, if excepted to, with the orders of the court respecting the same, and the exceptions to the report. If the report was not excepted to, only the fact that a reference was made, and so much of the report as shows what results were arrived at by the assessor, are to be stated.

(x) The final decree.

(xi) The prayer for an appeal, and the action of the District Court thereon; and no reasons of appeal shall be filed or inserted in the transcript.

What to omit.

The following shall be omitted:

(i) The continuances.

(ii) All motions, rules, and orders not excepted to which are merely preparatory for trial.

(iii) The commissions to take depositions, notices therefor, their captions, and certificates of their being sworn to, unless some exception to a deposition in the District Court was founded on some one or more of these; in which case, so much of either of them as may be involved in the exception shall be set out. In all other cases it shall be sufficient to give the name of the witness and to copy the interrogatories and answers, and to state the name of the commissioner, and the place where and the date when the deposition was sworn to; and, in copying all depositions taken on interrogatories, the answer shall be inserted immediately following the question.

(2) The clerk of the District Court shall page the copy of the record thus made up, and shall make an index thereto, and he shall certify the entire document, at the end thereof, under the seal of the court, to be a transcript of the record of the

Record to be paged, indexed and certified.

District Court in the cause named at the beginning of the copy made up pursuant to this rule; and no other certificate of the record shall be needful or inserted.

(3) Hereafter, in making up the record to be transmitted to the Circuit Court on appeal, the clerk of the District Court shall omit there-^{Omissions on stipulation.} from any of the pleading, testimony, or exhibits which the parties by their proctors shall by written stipulation agree may be omitted; and such stipulation shall be certified up with the record.

Decisions

It is desirable upon appeals in admiralty that the record be so prepared as to show which witnesses were examined in the presence of the district judge and which were not. *The Egyptian Prince*, 67 *Fed. R.* 612-615, 14 *C. C. A.* 573.

Where documentary evidence has been omitted from the record it is competent for the party interested to have the same brought before the appellate court by certiorari, although the record contains the usual clerk's certificate that it contains a full and correct copy of the record. *Hoskins v. Fisher*, 125 *U. S.* 217-223, 31 *L. ed.* 759.

Where the assignments of error are good but the transcript was not properly made up and certified through ignorance of the parties, the appeal need not be dismissed, but the appellant may be directed to file a proper transcript within a named time. *The Ethel*, 31 *Fed. R.* 576.

In admiralty cases a liberal practice in relation to appeals is warranted; where, therefore, the record did not aver that the damages suffered by the appellant were in a sum sufficient to give the appellate court jurisdiction and it was suggested that in point of fact the sum in controversy exceeded the jurisdictional amount, appellant was allowed a limited time to make proof of that fact. *The Grace Girdler*, 6 *Wall.* 441-442, 18 *L. ed.* 790.

A rule of the District Court that the clerk should prepare and deliver to the Circuit Court the appeal and record in twenty days, *Held*, not to prevent the Circuit Court from entertaining the cause if for any reason this was not done. *The S. S. Osborne*, 105 *U. S.* 447-450, 26 *L. ed.* 1065.

In view of secs. 698 and 750, *Rev. Stats. (U. S. Comp. Stats. 1901, pp. 568, 591)*, the transcript on appeal need not always contain all the proofs, entries, papers, and proceedings in the court below. *Nashua & Lowell R. Cor. v. Boston & Lowell R. Cor.*, 61 *Fed. R.* 237-244, 9 *C. C. A.* 468.

By Clause 6 of Rule 8, Rules of Supreme Court, the record in causes where the facts have been found in the court below shall omit the testimony. See *The Adriatic*, 103 *U. S.* 730, 26 *L. ed.* 605.

Under the rules of the Supreme Court and the practice of the Court of Appeals, an appeal in admiralty is a trial *de novo*, and upon assignments of error covering questions of fact the appellate court will not review the opinion of the trial court unless all the evidence presented in the trial court is contained in the record. *Nelson v. White*, 83 *Fed. R.* 215-218, 32 *C. C. A.* 166.

The transcript should contain all the testimony taken in the court below in appeals from the District Court to the Circuit Court of Appeals, the Act of Feb. 16, 1875, limiting the Supreme Court to a review of questions of law arising on the record not being applicable to the Court of Appeals. *Ib.* 217.

Where the record does not contain all the testimony, the opinion of the trial judge may be reviewed, where the assignments of error present simply questions of law, or where the findings of fact made by the trial judge in connection with his opinions supply all the material facts necessary for a determination for such questions of law as the assignments of such error present. *Ib.* 218.

Where in making up the record on appeal, testimony taken at the trial could not be included because it was not reduced to writing, and after motion to dismiss the appeal the evidence of witnesses who had testified for the appellant was taken *de novo* before a notary public, the proctors for the appellee declining to appear after notice; *Held*, that the district judge had no authority to certify that such new evidence was the purport of the testimony, nor could the appellate court recognize the evidence so taken, but the court remanded the case to the court below with instructions to grant a new trial. *The Glide*, 72 *Fed. R.* 200-204, 18 *C. C. A.* 504.

While a case may be tried *de novo* in the Circuit Court of Appeals it will be done in extreme cases only. *Ib.* 203.

In any case in which all the proofs are not reduced to writing in the District Court and no equivalent is found in the record, the Court of Appeals will decline to try the facts anew. *The Philadelphian*, 60 *Fed. R.* 423, 9 *C. C. A.* 54.

Where the evidence taken is not reduced to writing in the lower court and there is no rule of that court requiring it to be reduced to writing, it would seem that an appeal upon the merits could only be heard, where the evidence adduced appears by an agreed statement of facts, or where a statement is made by the court of the evidence adduced, or of the facts proved. *The Edward H. Blake*, 92 *Fed. R.* 205.

The transcript of appeal in admiralty causes should contain all the evidence adduced on both sides. *Ib.* 205.

Where the record contains only the judge's notes of the testimony, and a part of the testimony of the witnesses, the case is not presented in such a manner as to allow the appellate court to review the testimony. *The Alejandro*, 56 *Fed. R.* 621-623, 6 *C. C. A.* 54.

RULE LIII

Whenever a cross-libel is filed upon any counterclaim, arising out of the same cause of action On cross-libel, out of same cause of action. for which the original libel was filed, the respondents in the cross-libel shall give security in the usual amount and form, to respond in damages, as claimed in said cross-libel, unless the court, on Security must be given, unless. cause shown, shall otherwise direct; and all proceedings upon the original libel shall be stayed until such security shall be given.

Decisions

Only the original parties can be joined as libellants or respondents in a cross-bill. *The Ping-on v. Blethen*, 11 *Fed. R.* 607-612.

A cross-libel for salvage on account of services rendered to the injured vessel cannot be brought upon a libel *in rem* for damages caused by a collision. *Crowell v. The Schooner Theresa Wolf*, 4 *Fed. R.* 162.

The words in Rule 53 "The same cause of action" do not mean the same legal demand or legal claim, but mean the same transaction, or subject-matter which has been the cause of the action brought, and include cases where the question in dispute is identical in both, the defense in one suit being the ground of claim in the other. *Vianello v. The Crédit Lyonnais*, 15 *Fed. R.* 637-638.

Where a libel was filed to recover the value of cargo not delivered, and a cross-libel filed to recover the freight unpaid, *Held*, that the questions in dispute were the same, and that respondents in the cross-libel should be required to give security. *Ib.*

Libellants in a cross-libel may require the respondents to give security although the vessel has not been bonded, but is still in custody, and although the original libellant has not given security in that action. *The Empresa Marítima á Vapor v. Steam Navigation Co.*, 16 *Fed. R.* 502-504.

The object of Rule 53 is that both parties stand on equal terms as regards security in cases of cross-demands upon the same subject of litigation. Where libellants in a suit *in rem* exact and obtain security through arrest of the property, the defendants in that suit may likewise be entitled to security in a cross-suit *in personam* for a counter-claim in respect to the same subject of litigation. *Ib.* 504.

Where a cross-libel is filed the court may stay proceedings in the first suit until an appearance be entered and other steps taken in the second suit. *Nichols v. Tremlett*, 1 *Spr.* 361; *Fed. Cases*, 10,247.

The object of Rule 53 is to compel the appearance and the furnishing of security by respondent in a cross-libel *in personam* in cases where it does not appear proper that he should be relieved from giving such security. *The Bristol*, 4 *Ben.* 55; *Fed. Cases*, 1,889.

Where a libel for damages sustained by collision is brought and the claimants in that case afterward filed a libel against the vessel belonging to the original libellants in the first case, for damages sustained by them in the same collision, with no prayer for process *in personam* against any person, *Held*, that the court did not obtain jurisdiction of the second libel without a seizure of the vessel. *Ib.*

Rule 53 applies as well to actions *in rem* as to those *in personam*. *The Toledo*, 1 *Brown's Adm.* 445; *Fed. Cases*, 14,077.

Rule 53 applies to a case where the original libel is *in personam* and prays for an attachment which is issued and served so that the suit is in effect *in rem*; its object is not simply to compel appearance, but is to place the parties upon an equality. *Lochmore S. S. Co. v. Hagar*, 78 *Fed. R.* 642.

Held, to be doubtful whether Rule 53 contemplates a case where the original libel is *in personam* and consequently no security was required of the respondent in the original cause. *Franklin Sugar R. Co. v. Funch*, 66 *Fed. R.* 342-343.

A demand for security and stay of proceedings should not be allowed when not asked for until the original libellants have taken their testimony. *Ib.* 343.

The court may order monition in a cross-libel to be served upon the proctors of the original libellant, a nonresident, and upon such service proceed to judgment *in personam* upon all matters covered by the cross-libel; and a subsequent dismissal of the original libel on motion of the libellant will not affect the jurisdiction so obtained. *The Eliza Lines*, 61 *Fed. R.* 308-323.

The case of *Nichols v. Tremlett*, 1 *Spr.* 361, decided in 1857, *Held*, not to be in accordance with the present practice. *Ib.* 323.

Where a vessel libelled in a suit *in rem* has changed owners between the time the alleged offense was committed and the filing of the libel, and by the terms of the purchase the former owners are liable for all claims against the vessel, *Held*, that the former owners, though not parties to the record in the original suit, but liable if the original libel be sustained, might file a cross-libel and require security and have a stay of proceedings in the original libel until such security is given. *The George H. Parker*, 1 *Flip*. 606; *Fed. Cases*, 5,334.

In a collision cause the respondents to the libel should file their cross-libel, take out process and have it served in the usual way. When this is done the libellants in the first suit become respondents in the cross-libel, and as such they must answer or stand the consequences of default. *Ward v. Chamberlain*, 21 *How*. 572-574, 16 L. ed. 219.

That the respondent in a cross-libel will be seriously embarrassed in his business and put to great expense and sacrifice is not sufficient grounds to exempt him from giving security. *Compagnie Universelle v. Belloni*, 45 *Fed. R.* 587.

An appeal from an order upon a cross-libel denying a demand for security and stay does not operate to suspend the proceedings in the original suit. *Franklin Sugar R. Co. v. Funch*, 73 *Fed. R.* 844-845, 20 *C. C. A.* 61.

Assuming without deciding that in the exercise of the authority given by Rule 53 the court may commit an error that would subject its action to review, still there ought to be no reversal of an order made thereunder, unless it clearly appears that the action of the court was unwarranted. The court refused to reverse an order denying a demand for security on a cross-libel because of inexcusable delay in asking for it. *Ib.* 845.

In admiralty if the respondent desire to obtain entire damages against the libellant, or damages in excess of those claimed by the libellant, a cross-libel is necessary, although matters of recoupment or counterclaim may be asserted in the answer. *Bowker v. United States*, 186 *U. S.* 135-140, 46 L. ed. 1090.

Where an appeal is prosecuted from the District Court direct to the Supreme Court under sec. 5 of the Act of Mar. 3, 1891, a decree dismissing a cross-libel is not a final judgment within the rule upon that subject. *Ib.* 142.

In admiralty a set-off may be pleaded which has no connection with the libellant's cause of action, though a cross-libel can only be filed upon counterclaims arising out of the same cause of action upon which the original libel was filed. *The C. B. Sanford*, 22 *Fed. R.* 863-864.

If respondent sets up a claim by way of recoupment it goes only to diminish or extinguish the demand of the libellant, and he can have no

decree for more than he is sued for except by filing a cross-libel. *Snow v. Carew*, 1 *Spr.* 324; *Fed. Cases*, 1,344.

Where suit is brought for a balance of wages alleged to be due and respondents by answer claim damages through the negligence and carelessness of the libellant, which they seek to set off against the libellant's claim, *Held*, that such acts of negligence if proved are the subject of set-off, but only to the extent of the wages claimed. *The Tom Lysle*, 48 *Fed. R.* 690-692.

Actions for damages for misrepresentations and breaches of contract for supplies are within the jurisdiction of admiralty, and the court upon cross-libel may inquire into breaches of such contract, and all the damages suffered thereby, whatever issues they may involve, and upon such cross-libel filed may require security or a stay of proceedings in an original libel *in rem* for the price of such supplies. *The Electron*, 48 *Fed. R.* 689-690.

By bringing a cross-libel the claimant loses no defense properly set up in his answer to the libel. *Ib.*

Rule 53 does not permit new and distinct matters not involved in the issues tendered by the original libel to be the basis of a cross-libel, but any cause of action in favor of a party called upon to defend against the original libel founded upon the same contract, or arising out of the same transaction, is a counterclaim which may be set up by cross-libel. *The Highland Light*, 88 *Fed. R.* 296-297.

Rule 53 must be construed to allow all matters in dispute between the parties which must necessarily be considered in a determination of the original case to be fully considered for all purposes, so that the rights of both parties may be protected and finally adjudicated in one suit. *Ib.* 297.

To a libel *in rem* to recover charges of loading, a cross-libel was allowed to be filed to recover damages for breach of promise to render towage service, both agreements being embodied in the same instruments. *Ib.*

The rule is well settled in admiralty that respondent may set up and prove and recoup for matters growing out of the same cause of action as is set up in the libel, and by averments in the answer may avail himself of all such matters to the extent of defeating the libellant's demand; but it is also well settled that if respondent desires affirmative relief beyond defeating the libel and a decree over and against the libellant, he must beside answering the case made by the libel, file a cross-bill, which is an independent proceeding with the formalities attendant upon an original libel. *The Edward H. Blake*, 92 *Fed. R.* 203-206.

Rule 53 is broad enough to cover those cases where the original action is *in personam* as well as *in rem*. The court, however, is to see that no injustice is done in its enforcement, and the burden is upon the respond-

ent in the cross-libel to show circumstances which would make the application of the rule unjust. *Morse I. & D. D. Co. v. Luckenbach*, 123 *Fed. R.* 332-334, 59 *C. C. A.* 236.

To a libel filed for injury to a vessel from the defect of a dock, the dock owner was allowed to file a cross-libel against the vessel for expenses of pumping her out and placing her in the dock so that her cargo could be discharged. *Genthner v. Wiley*, 85 *Fed. R.* 797.

Where the claimant of a libelled vessel procures an order requiring libellant to give security to the claimant for damages claimed in his cross-libel, upon dismissal of the cross-libel the claimant is properly taxed with the amount paid by libellant to a surety company for furnishing such bond. *Jacobson v. Lewis Klondike Ex. Co.*, 112 *Fed. R.* 73-80, 50 *C. C. A.* 121.

Supplementary rules of practice in admiralty, under the Act of Mar. 3, 1851, entitled "An act to limit the liability of shipowners and for other purposes."

RULE LIV

When any ship or vessel shall be libelled, or the owner or owners thereof shall be sued, for any embezzlement, loss, or destruction by the master, officers, mariners, passengers, or any other person or persons, of any property, goods, or merchandise shipped or put on board of such ship or vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture done, occasioned, or incurred, without the privity or knowledge of such owner or owners, and he or they shall desire to claim the benefit of limitation of liability provided for in the third and fourth sections of the said act above recited, the said owner or owners shall and may file a libel or petition in the proper District Court of the United States, as hereinafter specified, setting forth the facts and circumstances on which such limitation of liability is claimed, and praying proper relief in that behalf; and thereupon said court, having caused due appraisement to be had of the amount or value of the interest of said owner or owners, respectively, in such ship or vessel, and her freight, for the voyage, shall make an order for the payment of the same into court, or for the giving of

Owners claiming limitation of liability under Act of Mar. 3, 1851, may file libel.

After appraisement, may order payment into court of value of interest in vessel.

a stipulation, with sureties, for payment thereof into court whenever the same shall be ordered; or, if the said owner or owners shall so elect, the said court shall, without such May order transfer of interest to trustee without appraisement. appraisement, make an order for the transfer by him or them of his or their interest in such vessel and freight, to a trustee to be appointed by the court under the fourth section of said act; and, upon compliance with such order, the said court shall issue a Monition, how served. monition against all persons claiming damages for any such embezzlement, loss, destruction, damage, or injury, citing them to appear before the said court and make due proof of their respective claims at or before a certain time to be named in said writ, not less than three months from the issuing of the same; and public notice of such monition shall be given as in other cases, and such further notice served through the post office, or otherwise, as the court, in its discretion, may direct; and the said court Further prosecution of suits restrained. shall also, on the application of the said owner or owners, make an order to restrain the further prosecution of all and any suit or suits against said owner or owners in respect of any such claim or claims.

Decisions

In a proceeding claiming the benefit of the limitation of liability provided for in sec. 4,282 and sec. 4,284, *Rev. Stats. (U. S. Comp. Stats. 1901, p. 2943)*, *Held*, that the value of the vessel or interest of the party may be judicially ascertained primarily without a hearing of the persons interested adversely, and that such *ex parte* appraisement is not void, though irregular. *In re Morrison*, 147 U. S. 14-34, 37 L. ed. 60.

The Supreme Court in providing by Rule 54 for the making by the District Court of an order to restrain the prosecution of suits against shipowners in respect to the claims mentioned in that rule, intended that persons prosecuting suits in State courts should be restrained. No provision for notice of application for a restraining order has been made. *In re Providence & N. Y. S. S. Co.*, 6 Ben. 124; *Fed. Cases*, 11,451.

The Supreme Court had power to make Rule 54 notwithstanding the provisions of the Act of Mar. 2, 1793, sec. 5, that an injunction should not be granted to stay proceedings in any State court. *Ib.*

Where upon an appraisement under Rule 54 the privilege is granted to the original libellant of being heard on the appraisement, it is proper that the court should direct a stay of his proceedings while the pre-

liminary steps are being taken to put into the hands of the court a sum of money or stipulation, representing the interest of the defendants, owners of the vessel libelled. *Ib.*

The rule of limited responsibility applies to foreign ships as well as domestic, and as well in favor of foreign shipowners as against them. *The Scotland*, 105 *U. S.* 24-31, 26 L. ed. 1001.

Where a rule adopted by Congress is the same as a rule of the general maritime law, its efficacy as a rule depends upon the statute and not upon any inherent force of the maritime law, and must be interpreted and administered as statute law.

The code or system of laws by which the mutual rights of the parties are to be determined, stated. *Ib.* 29.

Shipowners may avail themselves of the Act of Congress limiting their liability by plea or answer instead of the methods prescribed by Rule 54. Rule 54 was not intended to restrict but to aid in consolidating claims against the owners arising from the acts of the master or crew. *Ib.* 33.

Two modes are given for securing to the owner a limitation of liability to the amount or value of his interest in the vessel or freight, one by sec. 4,284, *Rev. Stats.*, and the other by sec. 4,285, *Rev. Stats.* (*U. S. Comp. Stats.* 1901, p. 2944). *Ib.* 34.

Where the benefit of the limited liability law is pleaded to the libel a decree may be made against the respondents for the amount of their liability, and the amount paid into court distributed among the parties entitled to it. It is not necessary that the shipowner should surrender the ship and freight, which is but one of the two proceedings to claim relief. He may insist upon the benefit of the law while denying liability, and if found liable the decree may go against the value of the property saved, including the freight or passage money realized. *Ib.* 35.

In a collision cause the owner of the vessel is not precluded from thereafter claiming the benefit of the limited liability act by denying all liability whatever. *The Benefactor*, 103 *U. S.* 239-243, 26 L. ed. 351.

Where in proceedings for damages for collision a decree has been rendered in favor of the libellants, and the owners thereafter file a petition for limited liability, the libellants may be restrained from enforcing their decree, until final action had upon the petition, in any other manner than by *pro rata* distribution of the fund standing by stipulation in place of the ship and freight. *Ib.* 246.

The extent of the liability of the owner is the value of the ship and freight after the injury has occurred, so that if the ship was destroyed the liability is gone, and if not destroyed the owners may surrender the ship in discharge of their liability. *Ib.* 246.

Proceedings for the limitation of a liability not instituted until after a party has obtained satisfaction of his demand are ineffectual as to him. A return of the money should not be compelled, nor in general

should relief be granted, except upon condition of compensating the party for costs and expenses by reason of delay in filing the petition. *Ib.* 245.

A libel for damages in a collision case may be ordered to be stayed until the owners of the offending vessel have an opportunity of filing a petition or libel under the Act of Congress limiting their liability. *The Maria and Elizabeth*, 11 *Fed. R.* 520-521.

The owner of the vessel before suit brought against him or the vessel may institute proceedings to obtain the benefit of the Act of Congress limiting liability. *Ex parte Slayton*, 105 *U. S.* 451-452, 26 *L. ed.* 1066.

Where a vessel has been attached by process from a State court, and afterward the cause removed into the United States court, the possession of the vessel by the marshal or trustee is not necessary for the purpose of proceeding for limitation of liability; but where further proceedings in the State court have been enjoined, the vessel may be ordered sold by the United States court on application by the trustee on cause shown, and the attachment transferred to the proceeds of the sale. *The Mendota*, 14 *Fed. R.* 358-363.

In a proceeding for the limitation of liability, the decree adjudging the rights of the parties and referring the cause to a commissioner to take testimony on claims for damages, may be reviewed, upon an appeal from the final decree, made after the master's report is in disposing of the whole cause, although that appeal is taken long after the entry of an interlocutory decree. *La Bourgogne*, 139 *Fed. R.* 433-435.

RULE LV

Proof of all claims which shall be presented in pursuance of said monition shall be made before a commissioner, to be designated by the court, subject to the right of any person interested to question or controvert the same; and upon the completion of said proofs, the commissioner shall make report of the claims so proven, and upon confirmation of said report, after hearing any exceptions thereto, the moneys paid or secured to be paid into court as aforesaid, or the proceeds of said ship or vessel and freight (after payment of costs and expense), shall be divided *pro rata* amongst the several claimants in proportion to the amount of their respective claims, duly proved and confirmed as aforesaid, saving, however, to all parties any priority to which they may be legally entitled.

Decisions

Rule 55 contemplates the payment of all costs and expenses necessarily incident to the sale of the vessel and the proof of the claims, including the clerk's commission upon the money paid into court. *The Vernon*, 36 *Fed. R.* 113-114.

Where the fund still remains in court the filing of claims may be permitted after the time fixed by the monition therefor has expired by those seeking to share in the fund secured by the stipulation furnished under Rule 54. *The Argos*, 100 *Fed. R.* 142-144.

The *pro rata* distribution of the fund where the amount was not sufficient to pay off the claims in full provided for by sec. 4,284, *Rev. Stats.* (*U. S. Comp. Stats.* 1901, p. 2944), relates to a distribution among those whose losses arise from the collision, and has no reference to other liens of an inferior grade against the vessel. A decree for damages on the cause of collision overrides all prior liens, even the wages of seamen. *The Maria and Elizabeth*, 12 *Fed. R.* 627-630.

RULE LVI

In the proceedings aforesaid, the said owner or owners shall be at liberty to contest his or their liability, or the liability of said ship or vessel for said embezzlement, loss, destruction, damage, or injury (independently of the limitation of liability claimed under said act), provided that, in his or their libel or petition, he or they shall state the facts and circumstances by reason of which exemption from liability is claimed; and any person or persons claiming damages as aforesaid, and who shall have presented his or their claim to the commissioner under oath, shall and may answer such libel or petition, and contest the right of the owner or owners of said ship or vessel, either to an exemption from liability, or to a limitation of liability under the said Act of Congress, or both.

Decisions

Where a petition under the Limited Liability Act is brought after the vessel has been decreed to be liable for damages sustained by a collision the question of liability is *res adjudicata*, and is in no way involved in the application of the owners for the benefit of the act. The losing party cannot revive and retry the case upon its merits on such petition. *The Maria and Elizabeth*, 12 *Fed. R.* 627-630.

A person claiming damages may contest the jurisdiction of the court without presenting his claim to the commissioner as provided in Rule 56, but not the right of the shipowners to exemption from liability. *In re Providence and N. Y. S. S. Co.*, 6 Ben. 258; *Fed. Cases*, 11,425

Rule 56 was intended to relieve shipowners from the English rule requiring them to confess a ship to have been in fault in a collision when they seek the benefit of the law of limited liability. Under Rule 56 a party seeking such limitation is allowed to contest any liability whatever. *The Benefactor*, 103 U. S. 239-243, 26 L. ed. 351.

This rule was not intended to abrogate the rule of law that a matter once regularly decided between parties in a competent tribunal cannot be again opened by either of them except in appellate proceedings. Rule 56 allowing contestation of all liability cannot be applied where the question of general liability has already been adjudicated. Nor do proceedings under the rule for limitation of liability prevent the due prosecution of an appeal on a primary cause of collision. *Ib.* 243.

RULE LVII

The said libel or petition shall be filed and the said proceedings had in any District Court of the United States in which said ship or vessel may be libelled to answer for any such embezzlement, loss, destruction, damage, or injury; or, if the said ship or vessel be not libelled, then in the District Court for any District in which the said owner or owners may be sued in that behalf. When the said ship or vessel has not been libelled to answer the matters aforesaid, and suit has not been commenced against the said owner or owners, or has been commenced in a district other than that in which the said ship or vessel may be, the said proceedings may be had in the District Court of the district in which the said ship or vessel may be, and where it may be subject to the control of such court for the purposes of the case as hereinbefore provided. If the ship have already been libelled and sold, the proceeds shall represent the same for the purposes of these rules.

Where libel or petition filed.

When ship not libelled, or suit begun in district other than where ship is, where proceedings to be had.

Decisions

The owners' liability is limited to such loss or damage as occurs on the last voyage preceding the filing of the petition or in which the vessel

was lost. Immunity from a liability for a series of losses happening on different voyages cannot be had. *The Alpena*, 8 *Fed. R.* 280-283.

The measure of the owner's liability is the value of the ship immediately after the loss or damage complained of. *Ib.* 285.

Where petition for limitation of liability is filed after proceedings brought against the ship for loss, or damage, it must be filed in the same district where such suits are begun. *Ib.* 285.

On objection that one of the petitioners seeking to limit their liability reside in the district and that neither the ship nor any part of it nor the cargo are in the jurisdiction of the court, *Held*, that the court had jurisdiction where it had possession of a fund or where it had already taken jurisdiction of proceedings wherein a plain equity required that a final decree should be framed with reference to proceedings that might be had to limit the liabilities of the owner. *In re Leonard*, 14 *Fed. R.* 53-55.

Where a libel for damages was brought against a vessel in the eastern district and afterwards suit was brought in the State court for the southern district, *Held*, that the petition should be filed in the eastern district. *In re The Lukenbach*, 26 *Fed. R.* 870-871.

The words "May be libelled" in the rule construed to include cases in which a ship may have been libelled. *Ib.* 871.

In a collision between a vessel owned in New York and one owned in Massachusetts, *Held*, that the vessel not having been libelled to answer for the loss resulting from the collision, and no suit therefor having been commenced against her owners, proceedings to limit liability were properly instituted by the Massachusetts owners in the District Court in Massachusetts where the vessel was at the time proceedings were instituted. *In re Morrison*, 147 *U. S.* 14-33, 37 *L. ed.* 60.

If the ship has been already libelled and sold, the proceeds represent the same under Rule 57. And if stipulation has been given, the stipulation is a substitute for the vessel. *The Oregon*, 158 *U. S.* 186-211, 39 *L. ed.* 943.

RULE LVIII

All the preceding rules and regulations for proceeding in cases where the owner or owners of a ship or vessel shall desire to claim the benefit of limitation of liability provided for in the Act of Congress in that behalf, shall apply to the Circuit Courts of the United States where such cases are or shall be pending in said courts upon appeal from the District Courts.

Cases in Circuit Courts within act.

Decisions

Proceedings for limitation of liability should originate in the District Court. *The Mary Lord*, 31 *Fed. R.* 416-417.

RULE LIX

In a suit for damage by collision, if the claimant of any vessel proceeded against, or any respondent proceeded against *in personam*, shall, by petition, on oath, presented before or at the time of answering the libel, or within such further time as the court may allow, and containing suitable allegations showing fault or negligence in any other vessel contributing to the same collision, and the particulars thereof, and that such other vessel or any other party ought to be proceeded against in the same suit for such damage, pray that process be issued against such vessel or party to that end, such process may be issued, and, if duly served, such suit shall proceed as if such vessel or party had been originally proceeded against; the other parties in the suit shall answer the petition; the claimant of such vessel or such new party shall answer the libel; and such further proceedings shall be had and decree rendered by the court in the suit as to law and justice shall appertain. But every petitioner shall, upon filing his petition, give a stipulation, with sufficient sureties, to pay to the libellant and to any claimant or new party brought in by virtue of such process, all such costs, damages, and expenses as shall be awarded against the petitioner by the court upon the final decree, whether rendered in the original or appellate court; and any such claimant or new party shall give the same bonds or stipulations which are required in like cases from parties brought in under process issued on the prayer of a libellant.

Decisions

A court of admiralty has jurisdiction of an independent suit to enforce contribution in cases of collision by one of two vessels against the other, contributors to a collision; but where there has been a final decree in which both vessels, contributors to the collision and all the parties in

interest are before the court, and that decree determines the facts as to the collision and apportions the damages between the two vessels, *Held*, that such decree is conclusive as to all persons touching the rights and liabilities of each of the vessels arising out of the collision and that an independent suit brought by one vessel against the other, to enforce contribution to cargo damages, refused in the original suit for lack of appropriate pleadings, cannot be maintained. *Erie & W. Transp. Co. v. Erie R. Co.*, 142 *Fed. R.* 9-15, 73 *C. C. A.* 195.

Where a decree in admiralty is rendered against the owner of a vessel and its surety upon a stipulation entered into under sec. 941, *Rev. Stats.*, and the admiralty rules, for the release of a vessel libelled for damages caused by collision, it is not necessary for the surety to join in the appeal or to be severed, but the owner of the vessel alone may prosecute the appeal. *The New York*, 104 *Fed. R.* 561-563, 44 *C. C. A.* 38.

The doctrine of an equal division of damages in admiralty in the case of a collision between two vessels where both are guilty of fault contributive to the collision, first announced in 17 *How.* 170, has been applied where both vessels being in fault, only one of them was injured, as well as to cases where both were injured. In the first case the injured vessel recovering only one-half its damages, and in the second case the damages suffered by two vessels being added together and equally divided and the vessel whose damages exceeded such one-half recovering the excess against the other vessel. *The Max Morris*, 137 *Fed. R.* 1-8, 69 *C. C. A.* 1.

Cases recognizing the rule as to an equal division of the loss cited on page 9.

Rule 59 authorizes the claimant or respondent in suits for damages by collision to compel the libellant to bring in another vessel alleged to have been in fault. *Ib.* 11.

Where a libel in a collision suit was filed against a vessel chartered, where the charterer supplied its own officers and crew, under Rule 59 the court may entertain a petition by the owners and claimants of the vessel to call in the charterer to show cause why he should not be condemned for the damages resulting from the collision. *The Barnstable*, 181 *U. S.* 464-467, 45 *L. ed.* 954.

In a collision through negligence of the charterer the ship itself is treated in some sense as a principal and as liable for the negligence of those in possession of her. *Ib.* 467.

The liability of the vessel for the negligence of the charterers is fixed by *Rev. Stats.*, sec. 4,286 (*U. S. Comp. Stats.* 1901, p. 2944). *Ib.* 468.

If there are no provisions to the contrary in the charter party, the charterers are liable for the consequence of their negligence in the navigation of the ship, and are bound to return her to the owners free from any lien caused by their own fault. *Ib.* 468.

Upon contracts of affreightment made by a charterer as a special owner, a decree for loss by negligence may be made against the ship, final, as between the libellant and the owners, and such decree need not provide that the libellant collect from the charterers in the first instance, and only the deficiency, if any, be collected from the ship. *The Alert*, 61 *Fed. R.* 113-115, 9 *C. C. A.* 390.

Where both the ship and charterers are charged with liability for breach of the same contract of affreightment, they may be joined to answer in the same proceeding and the question whether the liability ought to be borne by one rather than the other, or be shared, can be determined in the one suit. *The Planet Venus*, 113 *Fed. R.* 387-389.

In a suit for collision brought by the owner of one of two vessels in a collision cause, in which the owners of her cargo were joint libellants against another vessel, where the decree was that the two vessels were equally in fault and the recovery of the libellant vessel owner restricted to one-half of his loss, but full recovery decreed against the other vessel, for the losses sustained by the innocent cargo owners, although the libellant owner failed to avail himself of the remedy afforded by Rule 59, *Held*, he was not precluded from recouping from the amount awarded against his own vessel, in favor of the other vessel, one-half the loss which he was decreed to pay to the innocent cargo owners. *The Livingston*, 104 *Fed. R.* 918-927.

Rule 59 is remedial and should be liberally applied. The owners of a vessel libelled *in rem* in a collision cause may by petition bring into the suit other parties liable for the same collision with process *in personam* against them, and it is no objection that the proceedings thereafter are *in rem* and *in personam* in the same action. *Joice v. Canal Boats*, 32 *Fed. R.* 553-554.

While Rule 59 does not in terms provide for other than collision cases, the principle on which it is based may be applied by analogy to other cases to assist in the administration of justice requiring the appearance of any additional defendant who may be responsible for the claim in suit or any part thereof; applied in a suit for salvage where the libellee alleged that the vessel saved had been cast adrift by the negligence of other parties and asked that process be issued against them and that they be made respondents in the action. *Dailey v. The City of New York*, 119 *Fed. R.* 1,005.

RULES

OF THE

SUPREME COURT OF THE UNITED STATES

RELATING TO

APPEALS FROM THE COURT OF CLAIMS

*As adopted by the Supreme Court in 1886 and subsequently
added to and amended*

RULE I

In all cases hereafter decided in the Court of Claims, in which, by the Act of Congress, such appeals are allowable, they shall be heard in the Supreme Court upon the following record, and none other:

*Record on which ap-
peals are heard in Su-
preme Court. 9 Wall.
419; 116 U. S. 154, 402.*

(1) A transcript of the pleadings in the case, of the final judgment or decree of the court, and of such interlocutory orders, rulings, judgments, and decrees as may be necessary to a proper review of the case.¹

*Transcript of pleadings,
etc. 116 U. S. 402; 1
Wall. 102.*

(2) A finding by the Court of Claims of the facts in the case, established by the evidence, in the nature of a special verdict, but not the evidence establishing them; and a separate statement of the conclusions of law upon said facts on which the court founds its judgment or decree. The finding of facts and conclusions of law to be certified to this court as part of the record.²

*Finding of fact and con-
clusions of law. 17
Wall. 17; 5 Wall. 419;
93 U. S. 605; 111 U. S.
609; 6 Wall. 101; 116
U. S. 154.*

¹ Rule 8, sec. 2, of the Supreme Court requires the clerk to annex to and transmit with the record a copy of the opinion or opinions filed in the case.

² The following extract from the opinion of the Supreme Court in the case of *Burr v. The Des Moines Railroad and Navigation Co.*, 1 Wall. 102, will explain what is necessary to be set out in the findings:

"The statement of facts on which this court will inquire if there is or is not error in the application of the law to them is a statement of the ultimate facts or proposi-

RULE II

[Applied only to decisions rendered before its adoption
Obsolete rule. in 1866, and therefore long since obsolete.]

RULE III

In all cases an order of allowance of appeal by the Court
Allowance of appeals; application stops running of limitation. 17 Wall. 405. of Claims, or the chief justice thereof
in vacation, is essential, and the limita-
tion of time for granting such appeal
shall cease to run from the time an application is made for
the allowance of appeal.¹

RULE IV

In all cases in which either party is entitled to appeal to
Findings of fact and conclusions of law to be filed by court. the Supreme Court, the Court of Claims
shall make and file their findings of fact
and their conclusions of law therein, in open court, before
or at the time they enter judgment in the case.

RULE V

In every such case, each party, at such time before trial,
Parties before trial to submit request to find facts. and in such form as the court may pre-
scribe, shall submit to it a request to
find all the facts which the party considers proven and
deems material to the due presentation of the case in the
findings of fact.¹

tions which the evidence is intended to establish, and not the evidence on which those
ultimate facts are supposed to rest. The statement must be sufficient in itself, without
inferences or comparisons, or balancing of testimony, or weighing evidence, to justify
the application of the legal principles which must determine the case. It must leave
none of the functions of a jury to be discharged by this court, but must have all the
sufficiency, fullness, and perspicuity of a special verdict. If it requires of the court to
weigh conflicting testimony, or to balance admitted facts, and deduce from these the
proposition of fact on which alone a legal conclusion can rest, then it is not such a state-
ment as this court can act upon."

¹ Rule 8, sec. 5, and Rule 9, sec. 1, require that the record on appeal in cases from
all courts must be filed with the clerk of the Supreme Court and the case docketed
within thirty days from the allowance of the appeal.

Rule 20, sec. 1, permits submission of appeals from the Court of Claims on printed
briefs without oral argument, by consent of both parties, within the first ninety days
of the term, and thereafter within thirty days after docketing, but not later than
April 1. Twenty-five copies of the arguments, signed by attorneys or counsellors of the
Supreme Court, must first be filed.

RULE VI

Ordered, that Rule 1, in reference to appeals from the Court of Claims, be, and the same is hereby, made applicable to appeals in all cases heretofore or hereafter decided by that court under the jurisdiction conferred by the Act of June 16, 1880, c. 243, "to provide for the settlement of all outstanding claims against the District of Columbia, and conferring jurisdiction on the Court of Claims to hear the same, and for other purposes."

Adopted May 7, 1883.

GENERAL ORDERS IN BANKRUPTCY

PRESCRIBED BY

THE SUPREME COURT OF THE UNITED STATES

At its October Term, A. D. 1898

In pursuance of the powers conferred by the Constitution and laws upon the Supreme Court of the United States, and particularly by the Act of Congress approved July 1, 1898, entitled: "An Act to Establish a Uniform System of Bankruptcy throughout the United States," it is ordered, on this 28th day of November, 1898, that the following rules be adopted and established as general orders in bankruptcy, to take effect on the first Monday, being the 2d day of January, 1899. And it is further ordered that all proceedings in bankruptcy had before that day, in accordance with the act last aforesaid, and being in substantial conformity either with the provisions of these general orders, or else with the general orders established by this court under the bankrupt act of 1867 and with any general rules or special orders of the courts in bankruptcy, stand good; subject, however, to such further regulation by rule or order of those courts as may be necessary or proper to carry into force and effect the bankrupt act of 1898 and the general orders of this court.

RULE I—*Docket*

The clerk shall keep a docket, in which the cases shall be entered and numbered in the order in which they are commenced. It shall contain a memorandum of the filing of the petition and of the action of the court thereon, of the reference of the case to the referee, and of the transmission

by him to the clerk of his certified record of the proceedings, with the dates thereof, and a memorandum of all proceedings in the case except those duly entered on the referee's certified record aforesaid. The docket shall be arranged in a manner convenient for reference, and shall at all times be open to public inspection.

RULE II—*Filing of Papers*

The clerk or the referee shall indorse on each paper filed with him the day and hour of filing, and a brief statement of its character.

RULE III—*Process*

All process, summons, and subpoenas shall issue out of the court, under the seal thereof, and be tested by the clerk; and blanks, with the signature of the clerk and seal of the court, may, upon application, be furnished to the referees.

RULE IV—*Conduct of Proceedings*

Proceedings in bankruptcy may be conducted by the bankrupt in person in his own behalf, or by a petitioning or opposing creditor; but a creditor will only be allowed to manage before the court his individual interest. Every party may appear and conduct the proceedings by attorney, who shall be an attorney or counsellor authorized to practice in the Circuit or District Court. The name of the attorney or counsellor, with his place of business, shall be entered upon the docket, with the date of the entry. All papers or proceedings offered by an attorney to be filed shall be indorsed as above required, and orders granted on motion shall contain the name of the party or attorney making the motion. Notices and orders which are not, by the act or by these general orders, required to be served on the party personally may be served upon his attorney.

RULE V—*Form of Petitions*

All petitions and the schedules filed therewith shall be printed or written out plainly, without abbreviation or

interlineation, except where such abbreviation and interlineation may be for the purpose of reference.

RULE VI—*Petitions in Different Districts*

In case two or more petitions shall be filed against the same individual in different districts, the first hearing shall be had in the district in which the debtor has his domicile, and the petition may be amended by inserting an allegation of an act of bankruptcy committed at an earlier date than that first alleged, if such earlier act is charged in either of the other petitions; and in case of two or more petitions against the same partnership in different courts, each having jurisdiction over the case, the petition first filed shall be first heard, and may be amended by the insertion of an allegation of an earlier act of bankruptcy than that first alleged, if such earlier act is charged in either of the other petitions; and, in either case, the proceedings upon the other petitions may be stayed until an adjudication is made upon the petition first heard; and the court which makes the first adjudication of bankruptcy shall retain jurisdiction over all proceedings therein until the same shall be closed. In case two or more petitions shall be filed in different districts by different members of the same partnership for an adjudication of the bankruptcy of said partnership, the court in which the petition is first filed, having jurisdiction, shall take and retain jurisdiction over all proceedings in such bankruptcy until the same shall be closed; and if such petitions shall be filed in the same district, action shall be first had upon the one first filed. But the court so retaining jurisdiction shall, if satisfied that it is for the greatest convenience of parties in interest that another of said courts should proceed with the cases, order them to be transferred to that court.

RULE VII—*Priority of Petitions*

Whenever two or more petitions shall be filed by creditors against a common debtor, alleging separate acts of bankruptcy committed by said debtor on different days within

four months prior to the filing of said petitions, and the debtor shall appear and show cause against an adjudication of bankruptcy against him on the petitions, that petition shall be first heard and tried which alleges the commission of the earliest act of bankruptcy; and in case the several acts of bankruptcy are alleged in the different petitions to have been committed on the same day, the court before which the same are pending may order them to be consolidated, and proceed to a hearing as upon one petition; and if an adjudication of bankruptcy be made upon either petition, or for the commission of a single act of bankruptcy, it shall not be necessary to proceed to a hearing upon the remaining petitions, unless proceedings be taken by the debtor for the purpose of causing such adjudication to be annulled or vacated.

RULE VIII—*Proceedings in Partnership Cases*

Any member of a partnership, who refuses to join in a petition to have the partnership declared bankrupt, shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership, and notice of the filing of the petition shall be given to him in the same manner as provided by law and by these rules in the case of a debtor petitioned against; and he shall have the right to appear at the time fixed by the court for the hearing of the petition, and to make proof, if he can, that the partnership is not insolvent or has not committed an act of bankruptcy, and to make all defenses which any debtor proceeded against is entitled to take by the provisions of the act; and in case an adjudication of bankruptcy is made upon the petition, such partner shall be required to file a schedule of his debts and an inventory of his property in the same manner as is required by the act in cases of debtors against whom adjudication of bankruptcy shall be made.

RULE IX—*Schedule in Involuntary Bankruptcy*

In all cases of involuntary bankruptcy in which the bankrupt is absent or cannot be found, it shall be the duty

of the petitioning creditor to file, within five days after the date of the adjudication, a schedule giving the names and places of residence of all the creditors of the bankrupt, according to the best information of the petitioning creditor. If the debtor is found, and is served with notice to furnish a schedule of his creditors and fails to do so, the petitioning creditor may apply for an attachment against the debtor, or may himself furnish such schedule as aforesaid.

RULE X—*Indemnity for Expenses*

Before incurring any expense in publishing or mailing notices, or in traveling, or in procuring the attendance of witnesses, or in perpetuating testimony, the clerk, marshal, or referee may require, from the bankrupt or other person in whose behalf the duty is to be performed, indemnity for such expense. Money advanced for this purpose by the bankrupt or other person shall be repaid him out of the estate as part of the cost of administering the same.

RULE XI—*Amendments*

The court may allow amendments to the petition and schedules on application of the petitioner. Amendments shall be printed or written, signed and verified, like original petitions and schedules. If amendments are made to separate schedules, the same must be made separately, with proper references. In the application for leave to amend, the petitioner shall state the cause of the error in the paper originally filed.

RULE XII—*Duties of Referee*

(1) The order referring a case to a referee shall name a day upon which the bankrupt shall attend before the referee; and from that day the bankrupt shall be subject to the orders of the court in all matters relating to his bankruptcy, and may receive from the referee a protection against arrest, to continue until the final adjudication on his application for a discharge, unless suspended or vacated by order of the court. A copy of the order shall forthwith

be sent by mail to the referee or be delivered to him personally by the clerk or other officer of the court. And thereafter all the proceedings, except such as are required by the act or by these general orders to be had before the judge, shall be had before the referee.

(2) The time when and the place where the referees shall act upon the matters arising under the several cases referred to them shall be fixed by special order of the judge, or by the referee; and at such times and places the referees may perform the duties which they are empowered by the act to perform.

(3) Applications for a discharge, or for the approval of a composition, or for an injunction to stay proceedings of a court or officer of the United States or of a State, shall be heard and decided by the judge. But he may refer such an application, or any specified issue arising thereon to the referee to ascertain and report the facts.

RULE XIII—*Appointment and Removal of Trustee*

The appointment of a trustee by the creditors shall be subject to be approved or disapproved by the referee or by the judge; and he shall be removable by the judge only.

RULE XIV—*No Official or General Trustee*

No official trustee shall be appointed by the court, nor any general trustee to act in classes of cases.

RULE XV—*Trustee not Appointed in Certain Cases*

If the schedule of a voluntary bankrupt discloses no assets, and if no creditor appears at the first meeting, the court may, by order setting out the facts, direct that no trustee be appointed; but at any time thereafter a trustee may be appointed, if the court shall deem it desirable. If no trustee is appointed as aforesaid, the court may order that no meeting of the creditors other than the first meeting shall be called.

RULE XVI—*Notice to Trustee of his Appointment*

It shall be the duty of the referee, immediately upon the appointment and approval of the trustee, to notify him in person or by mail of his appointment; and the notice shall require the trustee forthwith to notify the referee of his acceptance or rejection of the trust, and shall contain a statement of the penal sum of the trustee's bond.

RULE XVII—*Duties of Trustee*

The trustee shall, immediately upon entering upon his duties, prepare a complete inventory of all the property of the bankrupt that comes into his possession. The trustee shall make report to the court, within twenty days after receiving the notice of his appointment, of the articles set off to the bankrupt by him, according to the provisions of the forty-seventh section of the act with the estimated value of each article, and any creditor may take exceptions to the determination of the trustee within twenty days after the filing of the report. The referee may require the exceptions to be argued before him, and shall certify them to the court for final determination at the request of either party. In case the trustee shall neglect to file any report or statement which it is made his duty to file or make by the act, or by any general order in bankruptcy, within five days after the same shall be due, it shall be the duty of the referee to make an order requiring the trustee to show cause before the judge, at a specified time in the order, why he should not be removed from office. The referee shall cause a copy of the order to be served upon the trustee at least seven days before the time fixed for the hearing, and proof of the service thereof to be delivered to the clerk. All accounts of trustees shall be referred as of course to the referee for audit, unless otherwise specially ordered by the court.

RULE XVIII—*Sale of Property*

(1) All sales shall be by public auction unless otherwise ordered by the court.

(2) Upon application to the court, and for good cause

shown, the trustee may be authorized to sell any specified portion of the bankrupt's estate at private sale; in which case he shall keep an accurate account of each article sold, and the price received therefor, and to whom sold, which account he shall file at once with the referee.

(3) Upon petition by a bankrupt, creditor, receiver, or trustee, setting forth that a part or the whole of the bankrupt's estate is perishable, the nature and location of such perishable estate, and that there will be loss if the same is not sold immediately, the court, if satisfied of the facts stated and that the sale is required in the interest of the estate, may order the same to be sold, with or without notice to the creditors, and the proceeds to be deposited in court.

RULE XIX—*Accounts of Marshal*

The marshal shall make return, under oath, of his actual and necessary expenses in the service of every warrant addressed to him, and for custody of property, and other services, and other actual and necessary expenses paid by him with vouchers therefor whenever practicable, and also with a statement that the amounts charged by him are just and reasonable.

RULE XX—*Papers Filed after Reference*

Proofs of claims and other papers filed subsequently to the reference, except such as call for action by the judge, may be filed either with the referee or with the clerk.

RULE XXI—*Proof of Debts*

(1) Depositions to prove claims against a bankrupt's estate shall be correctly entitled in the court and in the cause. When made to prove a debt due to a partnership, it must appear on oath that the deponent is a member of the partnership; when made by an agent, the reason the deposition is not made by the claimant in person must be stated; and when made to prove a debt due to a corporation, the deposition shall be made by the treasurer, or, if the corporation has no treasurer, by the officer whose duties most nearly

correspond to those of treasurer. Depositions to prove debts existing in open account shall state when the debt became or will become due; and if it consists of items maturing at different dates the average due date shall be stated, in default of which it shall not be necessary to compute interest upon it. All such depositions shall contain an averment that no note has been received for such account, nor any judgment rendered thereon. Proofs of debt received by any trustee shall be delivered to the referee to whom the cause is referred.

(2) Any creditor may file with the referee a request that all notices to which he may be entitled shall be addressed to him at any place, to be designated by the post office box or street number, as he may appoint; and thereafter, and until some other designation shall be made by such creditor, all notices shall be so addressed; and in other cases notices shall be addressed as specified in the proof of debt.

(3) Claims which have been assigned before proof shall be supported by a deposition of the owner at the time of the commencement of proceedings, setting forth the true consideration of the debt and that it is entirely unsecured, or if secured, the security, as is required in proving secured claims. Upon the filing of satisfactory proof of the assignment of a claim proved and entered on the referee's docket, the referee shall immediately give notice by mail to the original claimant of the filing of such proof of assignment; and if no objection be entered within ten days, or within further time allowed by the referee, he shall make an order subrogating the assignee to the original claimant. If objection be made, he shall proceed to hear and determine the matter.

(4) The claims of persons contingently liable for the bankrupt may be proved in the name of the creditor when known by the party contingently liable. When the name of the creditor is unknown, such claim may be proved in the name of the party contingently liable; but no dividend shall be paid upon such claim, except upon satisfactory proof that it will diminish *pro tanto* the original debt.

(5) The execution of any letter of attorney to represent

a creditor, or of an assignment of claim after proof, may be proved or acknowledged before a referee, or a United States commissioner, or a notary public. When executed on behalf of a partnership or of a corporation, the person executing the instrument shall make oath that he is a member of the partnership, or a duly authorized officer of the corporation on whose behalf he acts. When the person executing is not personally known to the officer taking the proof or acknowledgment, his identity shall be established by satisfactory proof.

(6) When the trustee or any creditor shall desire the re-examination of any claim filed against the bankrupt's estate, he may apply by petition to the referee to whom the case is referred for an order for such re-examination, and thereupon the referee shall make an order fixing a time for hearing the petition, of which due notice shall be given by mail addressed to the creditor. At the time appointed the referee shall take the examination of the creditor, and of any witnesses that may be called by either party, and if it shall appear from such examination that the claim ought to be expunged or diminished, the referee may order accordingly.

RULE XXII—*Taking of Testimony*

The examination of witnesses before the referee may be conducted by the party in person or by his counsel or attorney, and the witnesses shall be subject to examination and cross-examination, which shall be had in conformity with the mode now adopted in courts of law. A deposition taken upon an examination before a referee shall be taken down in writing by him, or under his direction, in the form of narrative, unless he determines that the examination shall be by question and answer. When completed it shall be read over to the witness and signed by him in the presence of the referee. The referee shall note upon the deposition any question objected to, with his decision thereon; and the court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just.

RULE XXIII—*Orders of Referee*

In all orders made by a referee, it shall be recited, according as the fact may be, that notice was given and the manner thereof; or that the order was made by consent; or that no adverse interest was represented at the hearing; or that the order was made after hearing adverse interests.

RULE XXIV—*Transmission of Proved Claims to Clerk*

The referee shall forthwith transmit to the clerk a list of the claims proved against an estate, with the names and addresses of the proving creditors.

RULE XXV—*Special Meeting of Creditors*

Whenever, by reason of a vacancy in the office of trustee, or for any other cause, it becomes necessary to call a special meeting of the creditors in order to carry out the purposes of the act, the court may call such a meeting, specifying in the notice the purpose for which it is called.

RULE XXVI—*Accounts of Referee*

Every referee shall keep an accurate account of his traveling and incidental expenses, and of those of any clerk or other officer attending him in the performance of his duties in any case which may be referred to him; and shall make return of the same under oath to the judge, with proper vouchers when vouchers can be procured, on the first Tuesday in each month.

RULE XXVII—*Review by Judge*

When a bankrupt, creditor, trustee, or other person shall desire a review by the judge of any order made by the referee, he shall file with the referee his petition therefor, setting out the error complained of; and the referee shall forthwith certify to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon.

RULE XXVIII—*Redemption of Property and Compounding of Claims*

Whenever it may be deemed for the benefit of the estate of a bankrupt to redeem and discharge any mortgage or other pledge, or deposit or lien, upon any property, real or personal, or to relieve said property from any conditional contract, and to tender performance of the conditions thereof, or to compound and settle any debts or other claims due or belonging to the estate of the bankrupt, the trustee, or the bankrupt, or any creditor who has proved his debt, may file his petition therefor; and thereupon the court shall appoint a suitable time and place for the hearing thereof, notice of which shall be given as the court shall direct, so that all creditors and other persons interested may appear and show cause, if any they have, why an order should not be passed by the court upon the petition authorizing such act on the part of the trustee.

RULE XXIX—*Payment of Moneys Deposited*

No moneys deposited as required by the act shall be drawn from the depository unless by check or warrant signed by the clerk of the court, or by a trustee, and countersigned by the judge of the court, or by a referee designated for that purpose, or by the clerk or his assistant under an order made by the judge, stating the date, the sum, and the account for which it is drawn; and an entry of the substance of such check or warrant, with the date thereof, the sum drawn for, and the account for which it is drawn shall be forthwith made in a book kept for that purpose by the trustee or his clerk; and all checks and drafts shall be entered in the order of time in which they are drawn, and shall be numbered in the case of each estate. A copy of this general order shall be furnished to the depository, and also the name of any referee or clerk authorized to countersign said checks.

RULE XXX—*Imprisoned Debtor* .

If, at the time of preferring his petition, the debtor shall be imprisoned, the court, upon application, may order him

to be produced upon habeas corpus, by the jailer or any officer in whose custody he may be, before the referee, for the purpose of testifying in any matter relating to his bankruptcy; and, if committed after the filing of his petition upon process in any civil action founded upon a claim provable in bankruptcy, the court may, upon like application, discharge him from such imprisonment. If the petitioner, during the pendency of the proceedings in bankruptcy, be arrested or imprisoned upon process in any civil action, the District Court, upon his application, may issue a writ of habeas corpus to bring him before the court to ascertain whether such process has been issued for the collection of any claim provable in bankruptcy, and if so provable he shall be discharged; if not, he shall be remanded to the custody in which he may lawfully be. Before granting the order for discharge the court shall cause notice to be served upon the creditor or his attorney, so as to give him an opportunity of appearing and being heard before the granting of the order.

RULE XXXI—*Petition for Discharge*

The petition of a bankrupt for a discharge shall state concisely, in accordance with the provisions of the act and the orders of the court, the proceedings in the case and the acts of the bankrupt.

RULE XXXII—*Opposition to Discharge or Composition*

A creditor opposing the application of a bankrupt for his discharge, or for the confirmation of a composition, shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, and shall file a specification in writing of the grounds of his opposition within ten days thereafter, unless the time shall be enlarged by special order of the judge.

RULE XXXIII—*Arbitration*

Whenever a trustee shall make application to the court for authority to submit a controversy arising in the settle-

ment of a demand against a bankrupt's estate, or for a debt due to it, to the determination of arbitrators or for authority to compound and settle such controversy by agreement with the other party, the application shall clearly and distinctly set forth the subject-matter of the controversy, and the reasons why the trustee thinks it proper and most for the interest of the estate that the controversy should be settled by arbitration or otherwise.

RULE XXXIV—*Costs in Contested Adjudications*

In cases of involuntary bankruptcy, when the debtor resists an adjudication, and the court, after hearing, adjudges the debtor a bankrupt, the petitioning creditor shall recover, and be paid out of the estate, the same costs that are allowed to a party recovering in a suit in equity; and if the petition is dismissed, the debtor shall recover like costs against the petitioner.

RULE XXXV—*Compensation of Clerks, Referees, and Trustees*

(1) The fees allowed by the act to clerks shall be in full compensation for all services performed by them in regard to filing petitions or other papers required by the act to be filed with them, or in certifying or delivering papers or copies of records to referees or other officers, or in receiving or paying out money; but shall not include copies furnished to other persons, or expenses necessarily incurred in publishing or mailing notices or other papers.

(2) The compensation of referees, prescribed by the act, shall be in full compensation for all services performed by them under the act, or under these general orders; but shall not include expenses necessarily incurred by them in publishing or mailing notices, in traveling, or in perpetuating testimony, or other expenses necessarily incurred in the performance of their duties under the act, and allowed by special order of the judge.

(3) The compensation allowed to trustees by the act shall be in full compensation for the services performed by them;

but shall not include expenses necessarily incurred in the performance of their duties and allowed upon the settlement of their accounts.

(4) In any case in which the fees of the clerk, referee, and trustee are not required by the act to be paid by a debtor before filing his petition to be adjudged a bankrupt, the judge, at any time during the pendency of the proceedings in bankruptcy, may order those fees to be paid out of the estate; or may, after notice to the bankrupt, and satisfactory proof that he then has or can obtain the money with which to pay those fees, order him to pay them within a time specified, and, if he fails to do so, may order his petition to be dismissed. He may also, pending such proceedings, both in voluntary and involuntary cases, order the commissions of referees and trustees to be paid immediately after such commissions accrue and are earned.

RULE XXXVI—*Appeals*

(1) Appeals from a court of bankruptcy to a Circuit Court of Appeals, or to the Supreme Court of a Territory, shall be allowed by a judge of the court appealed from or of the court appealed to, and shall be regulated, except as otherwise provided in the act, by the rules governing appeals in equity in the courts of the United States.

(2) Appeals under the act to the Supreme Court of the United States from a Circuit Court of Appeals, or from the Supreme Court of a Territory, or from the Supreme Court of the District of Columbia, or from any court of bankruptcy whatever, shall be taken within thirty days after the judgment or decree and shall be allowed by a judge of the court appealed from, or by a justice of the Supreme Court of the United States.

(3) In every case in which either party is entitled by the act to take an appeal to the Supreme Court of the United States, the court from which the appeal lies shall, at or before the time of entering its judgment or decree, make and file a finding of the facts, and its conclusions of law thereon, stated separately; and the record transmitted to

the Supreme Court of the United States on such an appeal shall consist only of the pleadings, the judgment or decree, the finding of facts, and the conclusions of law.

RULE XXXVII—*General Provisions*

In proceedings in equity, instituted for the purpose of carrying into effect the provisions of the act or for enforcing the rights and remedies given by it, the rules of equity practice established by the Supreme Court of the United States shall be followed as nearly as may be. In proceedings at law, instituted for the same purpose, the practice and procedure in cases at law shall be followed as nearly as may be. But the judge may, by special order in any case, vary the time allowed for return of process, for appearance and pleading, and for taking testimony and publication, and may otherwise modify the rules for the preparation of any particular case so as to facilitate a speedy hearing.

RULE XXXVIII—*Forms*

The several forms annexed to these general orders shall be observed and used, with such alterations as may be necessary to suit the circumstances of any particular case.

APPEAL AND REVIEW IN BANKRUPTCY

Act approved July 1, 1898, vol. 30, *Stat. L.* 553.

SECS. 24, 25 OF BANKRUPTCY ACT

Sec. 24. JURISDICTION OF APPELLATE COURTS.—(a) The Supreme Court of the United States, the Circuit Courts of Appeals of the United States, and the Supreme Courts of the Territories, in vacation in chambers and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases. The Supreme Court of the United States shall exercise a like jurisdiction from courts of bankruptcy not within any organized circuit of the United States and from the Supreme Court of the District of Columbia.

(b) The several Circuit Courts of Appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved.

Sec. 25. APPEALS AND WRITS OF ERROR.—(a) That appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the Circuit Court of Appeals of the United States, and to the Supreme Court of the Territories, in the following cases, to-wit: (1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over. Such appeal shall be taken within ten days after the judgment appealed from has been rendered, and may be heard and determined

by the appellate court in term or vacation, as the case may be.

(b) From any final decision of a Court of Appeals, allowing or rejecting a claim under this act, an appeal may be had under such rules and within such time as may be prescribed by the Supreme Court of the United States in the following cases and no other:

(1) Where the amount in controversy exceeds the sum of two thousand dollars, and the question involved is one which might have been taken on appeal or writ of error from the highest court of a State to the Supreme Court of the United States; or

(2) Where some justice of the Supreme Court of the United States shall certify that in his opinion the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of this act throughout the United States.

(c) Trustees shall not be required to give bond when they take appeals or sue out writs of error.

(d) Controversies may be certified to the Supreme Court of the United States from other courts of the United States, and the former court may exercise jurisdiction thereof and issue writs of certiorari pursuant to the provisions of the United States laws now in force or such as may be hereafter enacted.

ADDENDA

ADDENDA

JUDICIARY ACTS

JUDICIARY ACT OF SEPT. 24, 1789, AND THE AMENDMENT OF MARCH 2, 1793

An Act to establish the Judicial Courts of the United States

[Sec. 1.] *Be it enacted, etc.* That the Supreme Court of the United States shall consist of a chief justice, and five associate justices, and four of whom shall be a quorum, and shall hold annually, at the seat of government, two sessions, the one commencing the first Monday of February, and the other the first Monday of August. That the associate justices shall have precedence according to the date of their commissions, or, when the commissions of two or more of them bear date on the same day, according to their respective ages.

Sec. 2. That the United States shall be, and they hereby are, divided into thirteen districts, to be limited and called as follows, to wit: one to consist of that part of the State of Massachusetts, which lies easterly of the State of New Hampshire, and to be called Maine district; one to consist of the State of New Hampshire, and to be called New Hampshire district; one to consist of the remaining part of the State of Massachusetts, and to be called Massachusetts district; one to consist of the State of Connecticut, and to be called Connecticut district; one to consist of the State of New York, and to be called New York district; one to consist of the State of New Jersey, and to be called New Jersey district; one to consist of the State of Pennsylvania, and to be called Pennsylvania district; one to consist of the State of Delaware, and to be called Delaware district; one to consist of the State of Maryland, and to be called Maryland district; one to consist of the State of Virginia, except that part called

the district of Kentucky, and to be called Virginia district; one to consist of the remaining part of the State of Virginia, and to be called Kentucky district; one to consist of the State of South Carolina, and to be called South Carolina district; and one to consist of the State of Georgia, and to be called Georgia district.

Sec. 3. That there be a court called a District Court, in each of the aforementioned districts, to consist of one judge, who shall reside in the district for which he is appointed, and shall be called a district judge, and shall hold annually four sessions, the first of which to commence as follows, to wit: in the districts of New York and of New Jersey on the first, in the district of Pennsylvania on the second, in the district of Connecticut on the third, and in the district of Delaware on the fourth, Tuesdays of November next; in the districts of Massachusetts, of Maine, and of Maryland, on the first, in the district of Georgia on the second, and in the districts of New Hampshire, of Virginia, and of Kentucky, on the third, Tuesdays of December next; and the other three sessions, progressively, in the respective districts, on the like Tuesdays of every third calendar month afterwards; and in the district of South Carolina, on the third Monday in March and September, the first Monday in July, and the second Monday in December, of each and every year, commencing in December next; and that the district judge shall have power to hold special courts at his discretion. That the stated District Court shall be held at the places following, to wit: (Here follows a list of places where the District Court was directed to be held.) And that the special court shall be held at the same place, in each district, as the stated courts, or in districts that have two, at either of them, in the discretion of the judge, or at such other place, in the district, as the nature of the business and his discretion shall direct. And that, in the districts that have but one place for holding the District Court, the records thereof shall be kept at that place; and in districts that have two, at that place in each district which the judge shall appoint.

Sec. 4. That the before-mentioned districts, except those

of Maine and Kentucky, shall be divided into three circuits, and be called the Eastern, the Middle, and the Southern Circuits. That the Eastern Circuit shall consist of the districts of New Hampshire, Massachusetts, Connecticut, and New York; that the Middle Circuit shall consist of the districts of New Jersey, Pennsylvania, Delaware, Maryland, and Virginia; and that the Southern Circuit shall consist of the districts of South Carolina and Georgia; and that there shall be held annually in each district of said circuits, two courts, which shall be called Circuit Courts, and shall consist of any two justices of the Supreme Court, and the district judge of such districts, any two of whom shall constitute a quorum: *Provided*, that no district judges shall give a vote in any case of appeal, or error, from his own decision; but may assign the reasons of such his decision.

Sec. 5. That the first session of the said Circuit Court, in the several districts, shall commence at the times following, to wit: (Here follow the times and places for holding the Circuit Courts.) And the Circuit Courts shall have power to hold special sessions for the trial of criminal causes at any other time, at their discretion, or at the discretion of the Supreme Court.

Sec. 6. That the Supreme Court may, by any one or more of its justices being present, be adjourned from day to day, until a quorum be convened; and that a Circuit Court may also be adjourned from day to day by any one of its judges, or if none are present, by the marshal of the district, until a quorum be convened; and that a District Court, in case of the inability of the judge to attend at the commencement of a session, may by virtue of a written order from the said judge, directed to the marshal of the district, be adjourned by the said marshal, to such day, antecedent to the next stated session of the said court, as in the said order shall be appointed; and in case of the death of the said judge, and his vacancy not being supplied, all process, pleadings, and proceedings, of what nature soever, pending before the said court, shall be continued of course, until the next stated session, after the appointment and acceptance of the office by his successor.

Sec. 7. That the Supreme Court and the District Courts, shall have power to appoint clerks for their respective courts; and that the clerk for each District Court shall be clerk also of the Circuit Court in such district, and each of the said clerks shall, before he enters upon the execution of his office, take the following oath or affirmation, to wit: (Here follows the form of oath.) And the said clerks shall also severally give bond, with sufficient sureties (to be approved of by the Supreme and District Courts respectively), to the United States, in the sum of two thousand dollars, faithfully to discharge the duties of his office, and seasonably to record the decrees, judgments, and determinations, of the court of which he is clerk.

Sec. 8. That the justices of the Supreme Court, and the district judges, before they proceed to execute the duties of their respective offices, shall take the following oath or affirmation, to wit: "I, A. B., do solemnly swear, or affirm, that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent on me as ———, according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States. So help me God."

Sec. 9. That the District Courts shall have, exclusively of the courts of the several States, cognizance of all crimes and offenses, that shall be cognizable under the authority of the United States, committed within their respective districts, or upon the high seas; where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted; and shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation, or trade, of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts, as well as upon the high seas; saving to suitors, in all cases, the right of a common-

law remedy, where the common law is competent to give it; and shall also have exclusive original cognizance of all seizures on land, or other waters than as aforesaid, made, and of all suits for penalties and forfeitures incurred, under the laws of the United States. And shall also have cognizance, concurrent with the courts of the several States, or the Circuit Courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations, or a treaty of the United States. And shall also have cognizance, concurrent as last mentioned, of all suits at common law, where the United States sue, and the matter in dispute amounts, exclusive of costs, to the sum or value of one hundred dollars. And shall also have jurisdiction, exclusively of the courts of the several States, of all suits against consuls, or vice consuls, except for offenses above the description aforesaid. And the trial of issues in fact, in the District Courts, in all causes, except civil causes of admiralty and maritime jurisdiction, shall be by jury.

Sec. 10. (Relates to the jurisdiction of the District Court in Kentucky district and the District Court in Maine district.)

Sec. 11. That the Circuit Courts shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law, or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs, or petitioners; or an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State. And shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except where this act otherwise provides, or the laws of the United States shall otherwise direct, and concurrent jurisdiction with the District Courts, of the crimes and offenses cognizable therein. But no person shall be arrested in one district for trial in another, in any civil action, before a Circuit or District Court. And no civil suit shall be brought, before either of said courts, against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of

serving the writ; nor shall any District or Circuit Court, have cognizance of any suit to recover the contents of any promissory note, or other chose in action, in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange. And the Circuit Courts shall also have appellate jurisdiction from the District Courts, under the regulations and restrictions hereinafter provided.

Sec. 12. That if a suit be commenced in any State court against an alien, or by a citizen of the State in which the suit is brought against a citizen of another State, and the matter in dispute exceeds the aforesaid sum or value of five hundred dollars, exclusive of costs, to be made to appear to the satisfaction of the court, and the defendant shall, at the time of entering his appearance in such State court, file a petition for the removal of the cause for trial into the next Circuit Court, to be held in the district where the suit is pending, or if in the district of Maine to the District Court next to be holden therein, or if in Kentucky district, to the District Court next to be holden therein, and offer good and sufficient surety for his entering, in such court, on the first day of its session, copies of said process against him, and also for his there appearing, and entering special bail in the cause, if special bail was originally requisite therein, it shall then be the duty of the State court to accept the surety, and proceed no further in the cause; and any bail that may have been originally taken, shall be discharged; and the said copies being entered as aforesaid, in such court of the United States, the cause shall there proceed in the same manner as if it had been brought there by original process. And any attachment of the goods or estate of the defendant, by the original process, shall hold the goods or estate so attached, to answer the final judgment, in the same manner as by the laws of such State they would have been holden to answer final judgment, had it been rendered by the court in which the suit commenced. And if, in any action commenced in a State court the title of land be concerned, and the parties are citizens

of the same State, and the matter in dispute exceeds the sum or value of five hundred dollars, exclusive of costs, the sum or value being made to appear to the satisfaction of the court, either party, before the trial, shall state to the court, and make affidavit if they require it, that he claims, and shall rely upon a right, or title to the land, under grant from a State, other than that in which the suit is pending, and produce the original grant, or an exemplification of it, except where the loss of public records shall put it out of his power, and shall move that the adverse party inform the court whether he claims a right or title to the land under a grant from the State in which the suit is pending; the said adverse party shall give such information or otherwise not be allowed to plead such grant, or give it in evidence upon the trial; and if he informs that he does claim under such grant, the party claiming under the grant first mentioned, may then, on motion, remove the cause for trial to the next Circuit Court, to be holden in such district, or if in the district of Maine, to the court next to be holden therein; or if in Kentucky district, to the District Court next to be holden therein; but if he is the defendant, shall do it under the same regulations as in the before-mentioned case of the removal of a cause into such court by an alien: and neither party removing the cause, shall be allowed to plead, or give evidence of, any other title than that by him stated as aforesaid, as the ground of his claim. And the trial of issues in fact in the Circuit Court shall in all suits, except those of equity, and of admiralty and maritime jurisdiction, be by jury.

Sec. 13. That the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a State is a party, except between a State and its citizens, and except also between a State and citizens of other States, or aliens, in which latter case it shall have original, but not exclusive jurisdiction. And shall have exclusively, all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, as a court of law can have or exercise consistently with the law of nations; and original, but not exclusive

jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul or vice consul shall be a party. And the trial of issues in fact in the Supreme Court, in all actions at law against citizens of the United States, shall be by jury. The Supreme Court shall also have appellate jurisdiction from the Circuit Courts and courts of the several States, in the cases hereinafter specially provided for: and shall have power to issue writs of prohibition to the District Courts, when proceeding as courts of admiralty and maritime jurisdiction, and writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States.

Sec. 14. That all the before-mentioned courts of the United States shall have power to issue writs of scire facias, habeas corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the Supreme Court, as well as judges of the District Courts shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment. *Provided*, that writs of habeas corpus, shall, in no case, extend to prisoners in gaol, unless where they are in custody, under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify.

Sec. 15. That all the said courts of the United States shall have power, in the trial of actions at law, on motion and due notice thereof being given, to require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery; and if a plaintiff shall fail to comply with such order to produce books or writings, it shall be lawful for the courts, respectively, on motion, to give the like judgment for the defendant as in cases of nonsuit; and if a defendant shall fail to comply with such order to produce

books or writings, it shall be lawful for the courts, respectively, on motion as aforesaid, to give judgment against him or her by default.

Sec. 16. That suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate, and complete, remedy may be had at law.

Sec. 17. That all the said courts of the United States shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law, and shall have power to impose and administer all necessary oaths or affirmations, and to punish, by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same; and to make and establish all necessary rules for the orderly conducting of business, in the said courts, provided such rules are not repugnant to the laws of the United States.

Sec. 18. That when, in a Circuit Court, judgment upon a verdict in a civil action shall be entered, execution may, on motion of either party, at the discretion of the court, and on such conditions, for the security of the adverse party, as they may judge proper, be stayed forty-two days from the time of entering judgment, to give time to file, in the clerk's office of said court, a petition for a new trial. And if such petition be there filed within said term of forty-two days, with a certificate thereon, from either of the judges of such court, that he allows the same to be filed, which certificate he may make or refuse at his discretion, execution shall, of course, be further stayed to the next session of said court. And if a new trial be granted, the former judgment shall be thereby rendered void.

Sec. 19. That it shall be the duty of Circuit Courts, in causes in equity, and of admiralty and maritime jurisdiction, to cause the facts on which they found their sentence or decree, fully to appear upon the record, either from the pleadings and decree itself, or a state of the case agreed by the parties, or their counsel, or, if they disagree, by a stating of the case by the court.

Sec. 20. That where, in a Circuit Court, a plaintiff in an

action, originally brought there, or a petitioner in equity, other than the United States, recovers less than the sum or value of five hundred dollars, or a libellant, upon his own appeal, less than the sum or value of three hundred dollars, he shall not be allowed, but at the discretion of the court, may be adjudged to pay costs.

Sec. 21. That from final decrees in a District Court, in causes of admiralty and maritime jurisdiction, where the matter in dispute exceeds the sum or value of three hundred dollars, exclusive of costs, an appeal shall be allowed to the next Circuit Court, to be held in such district. *Provided, nevertheless*, that all such appeals from final decrees as aforesaid, from the District Court of Maine, shall be made to the Circuit Court next to be holden after each appeal in the district of Massachusetts.

Sec. 22. That final decrees and judgments, in civil actions in a District Court, where the matter in dispute exceeds the sum or value of fifty dollars, exclusive of costs, may be re-examined, and reversed, or affirmed, in a Circuit Court holden in the same district, upon a writ of error, whereto shall be annexed and returned therewith, at the day and place therein mentioned, an authenticated transcript of the record, and assignment of errors, and prayer for reversal, with a citation to the adverse party, signed by the judge of such District Court, or a justice of the Supreme Court, the adverse party having at least twenty days' notice. And upon a like process, may final judgments and decrees in civil actions, and suits in equity in a Circuit Court, brought there by original process, or removed there from courts of the several States, or removed there by appeal from a District Court, where the matter in dispute exceeds the sum or value of two thousand dollars, exclusive of costs, be re-examined and reversed, or affirmed, in the Supreme Court, the citation being in such case signed by a judge of such Circuit Court, or justice of the Supreme Court, and the adverse party having at least thirty days' notice. But there shall be no reversal in either court on such writ of error, for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court, or such plea to a

petition or bill in equity, as in the nature of a demurrer, or for any error in fact. And writs of error shall not be brought but within five years after rendering or passing the judgment or decree complained of, or in case the person entitled to such writ of error be an infant, *femme covert*, *non compos mentis*, or imprisoned, then within five years as aforesaid, exclusive of the time of such disability. And every justice, or judge, signing a citation on any writ of error as aforesaid, shall take good and sufficient security, that the plaintiff in error shall prosecute his writ to effect and answer all damages and costs, if he fail to make his plea good.

Sec. 23. That a writ of error as aforesaid, shall be a supersedeas and stay execution, in cases only where the writ of error is served, by a copy thereof being lodged for the adverse party, in the clerk's office, where the record remains, within ten days, Sundays exclusive, after rendering the judgment or passing the decree complained of. Until the expiration of which term of ten days, executions shall not issue in any case where a writ of error may be a supersedeas; and where, upon such writ of error, the Supreme or a Circuit Court shall affirm a judgment or decree, they shall adjudge or decree to the respondent in error just damages for his delay, and single or double costs at their discretion.

Sec. 24. That when a judgment or decree shall be reversed in a Circuit Court, such court shall proceed to render such judgment, or pass such decree, as the District Court should have rendered or passed; and the Supreme Court shall do the same on reversals therein, except where the reversal is in favor of the plaintiff or petitioner in the original suit, and the damages to be assessed, or matter to be decreed, are uncertain, in which case they shall remand the cause for a final decision. And the Supreme Court shall not issue execution in causes that are removed before them by writs of error, but shall send a special mandate to the Circuit Court, to award execution thereupon.

Sec. 25. That a final judgment or decree in any suit, in the highest court of law or equity of a State in which a

decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of such their validity, or where is drawn in question the construction of any clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege, or exemption, specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute or commission, may be re-examined and reversed or affirmed, in the Supreme Court of the United States, upon a writ of error, the citation being signed by the chief justice, or judge or chancellor, of the court, rendering or passing the judgment or decree complained of, or by a justice of the Supreme Court of the United States, in the same manner and under the same regulations, and the writ shall have the same effect, as if the judgment or decree complained of had been rendered or passed in a Circuit Court, and the proceeding upon the reversal shall also be the same, except that the Supreme Court, instead of remanding the cause for a final decision, as before provided, may at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same, and award execution. But no other error shall be assigned or regarded as a ground of reversal, in any such case as aforesaid, than such as appears on the face of the record, and immediately respects the before-mentioned questions of validity or construction of the said Constitution, treaties, statutes, commissions, or authorities in dispute.

Sec. 26. That in all causes brought before either of the courts of the United States, to recover the forfeiture annexed to any articles of agreement, covenant, bond, or other specialty, where the forfeiture, breach, or nonperformance, shall appear by the default or confession of the defendant, or upon demurrer, the court before whom the

action is, shall render judgment therein for the plaintiff to recover so much as is due according to equity. And when the sum for which judgment should be rendered is uncertain, the same shall, if either of the parties request it, be assessed by a jury.

Sec. 27. That a marshal shall be appointed, in and for each district, for the term of four years, but shall be removable from office at pleasure; whose duty it shall be to attend the District and Circuit Courts, when sitting therein, and also the Supreme Court in the district in which that court shall sit; and to execute throughout the district, all lawful precepts directed to him, and issued under the authority of the United States, and he shall have power to command all necessary assistance in the execution of his duty, and to appoint, as there shall be occasion, one or more deputies, who shall be removable from office by the judge of the District Court, or the Circuit Court sitting within the district, at the pleasure of either. And before he enters on the duties of his office, he shall become bound for the faithful performance of the same, by himself and by his deputies, before the judge of the District Court, to the United States, jointly and severally, with two good and sufficient sureties, inhabitants and freeholders of such district to be approved by the district judge, in the sum of twenty thousand dollars, and shall take, before said judge, as shall also his deputies, before they enter on the duties of their appointment, the following oath of office: (Here follows the form of oath.)

Sec. 28. That in all causes wherein the marshal, or his deputy, shall be a party, the writs and precepts therein shall be directed to such disinterested person as the court, or any justice or judge thereof may appoint, and the person so appointed is hereby authorized to execute and return the same. And in case of the death of any marshal, his deputy, or deputies, shall continue in office, unless otherwise specially removed; and shall execute the same in the name of the deceased, until another marshal shall be appointed and sworn: and the defaults, or misfeasances in office of such deputy or deputies in the meantime, as well as before, shall

be adjudged a breach of the condition of the bond given, as before directed, by the marshal who appointed them; and the executor or administrator of the deceased marshal shall have like remedy for the defaults and misfeasances in office of such deputy or deputies during such interval, as they would be entitled to if the marshal had continued in life, and in the exercise of his said office, until his successor was appointed, and sworn or affirmed: And every marshal, or his deputy, when removed from office, or when the term for which the marshal is appointed shall expire, shall have power, notwithstanding, to execute all such precepts as may be in their hands, respectively, at the time of such removal or expiration of office; and the marshal shall be held answerable for the delivery to his successor of all prisoners which may be in his custody at the time of his removal, or when the term for which he is appointed shall expire, and for that purpose may retain such prisoners in his custody, until his successor shall be appointed, and qualified as the law directs.

Sec. 29. That in cases punishable with death, the trial shall be had in the county where the offense was committed; or where that cannot be done without great inconvenience, twelve petit jurors at least shall be summoned from thence. And jurors in all cases to serve in the courts of the United States, shall be designated by lot or otherwise, in each State respectively, according to the mode of forming juries therein now practiced, so far as the laws of the same shall render such designation practicable, by the courts or marshals of the United States; and the jurors shall have the same qualifications as are requisite for jurors by the laws of the State of which they are citizens, to serve in the highest courts of law of such State, and shall be returned, as there shall be occasion for them, from such parts of the district, from time to time, as the court shall direct, so as shall be most favorable to an impartial trial, and so as not to incur an unnecessary expense, or unduly to burthen the citizens of any part of the district with such services. And writs of *venire facias*, when directed by the court, shall issue from the clerk's office, and shall be served and returned by the

marshal in his proper person, or by his deputy, or, in case the marshal or his deputy is not an indifferent person, or is interested in the event of the cause, by such fit person as the court shall specially appoint for that purpose, to whom they shall administer an oath or affirmation, that he will *truly and impartially serve and return such writ*. And when, from challenges, or otherwise, there shall not be a jury to determine any civil or criminal cause, the marshal or his deputy shall, by order of the court where such defect of jurors shall happen, return jurymen *de talibus circumstantibus* sufficient to complete the panel; and when the marshal or his deputy are disqualified as aforesaid, jurors may be returned by such disinterested person as the court shall appoint.

Sec. 30. That the mode of proof by oral testimony, and examination of witnesses in open court shall be the same in all the courts of the United States, as well in the trial of causes in equity and of admiralty and maritime jurisdiction, as of actions at common law. And when the testimony of any person shall be necessary in any civil cause depending in any district, in any court of the United States, who shall live at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of such district, and to a greater distance from the place of trial than as aforesaid, before the time of trial, or is ancient, or very infirm, the deposition of such person may be taken, *de bene esse*, before any justice or judge of any of the courts of the United States, or before any chancellor, justice, or judge of a Supreme or Superior Court, mayor, or chief magistrate of a city, or judge of a county court or court of common pleas of any of the United States, not being of counsel or attorney to either of the parties, or interested in the event of the cause, provided that a notification from the magistrate before whom the deposition is to be taken to the adverse party, to be present at the taking of the same, and to put interrogatories, if he think fit, be first made out and served on the adverse party, or his attorney, as either may be nearest, if either is within one

hundred miles of the place of such caption, allowing time for their attendance after notified, not less than at the rate of one day, Sundays exclusive, for every twenty miles travel. And in causes of admiralty and maritime jurisdiction, or other cases of seizure, when a libel shall be filed, in which an adverse party is not named, and depositions of persons circumstanced as aforesaid, shall be taken before a claim be put in, the like notification, as aforesaid, shall be given to the person having the agency or possession of the property libelled at the time of the capture or seizure of the same, if known to the libellant. And every person deposing as aforesaid, shall be carefully examined and cautioned, and sworn or affirmed to testify *the whole truth*, and shall subscribe the testimony by him or her given, after the same shall be reduced to writing, which shall be done only by the magistrate taking the deposition, or by the deponent in his presence. And the depositions so taken shall be retained by such magistrate, until he deliver the same with his own hand into the court for which they are taken, or shall, together with a certificate of the reasons as aforesaid, of their being taken, and of the notice, if any given to the adverse party, be by him, the said magistrate, sealed up and directed to such court, and remain under his seal until opened in court. And any person may be compelled to appear and depose as aforesaid, in the same manner as to appear and testify in court. And in the trial of any cause of admiralty or maritime jurisdiction in a District Court, the decree in which may be appealed from, if either party shall suggest to and satisfy the court, that probably it will not be in his power to produce the witnesses, there testifying, before the Circuit Court, should an appeal be had and shall move that their testimony be taken down in writing, it shall be so done by the clerk of the court. And if an appeal be had, such testimony may be used on the trial of the same, if it shall appear to the satisfaction of the court, which shall try the appeal, that the witnesses are then dead, or gone out of the United States, or to a greater distance than as aforesaid, from the place where the court is sitting; or that, by reason of age, sickness, bodily in-

firmity, or imprisonment, they are unable to travel and appear at court, but not otherwise. And unless the same shall be made to appear on the trial of any cause, with respect to witnesses whose depositions may have been taken therein, such depositions shall not be admitted or used in the cause. *Provided*, that nothing herein shall be construed to prevent any court of the United States from granting a *dedimus potestatem*, to take depositions according to common usage, when it may be necessary to prevent a failure or delay of justice; which power they shall severally possess; nor to extend to depositions taken in *perpetuam rei memoriam*, which, if they relate to matters that may be cognizable in any court of the United States, a Circuit Court, on application thereto made as a court of equity, may, according to the usages in chancery, direct to be taken.

Sec. 31. That where any suit shall be depending in any court of the United States, and either of the parties shall die before final judgment, the executor or administrator of such deceased party, who was plaintiff, petitioner, or defendant, in case the cause of action doth by law survive, shall have full power to prosecute or defend any such suit, or action, until final judgment; and the defendant or defendants are hereby obliged to answer thereto accordingly; and the court before whom such cause may be depending, is hereby empowered and directed to hear and determine the same, and to render judgment for or against the executor or administrator, as the case may require. And if such executor or administrator, having been duly served with a *scire facias*, from the office of the clerk of the court where such suit is depending, twenty days beforehand, shall neglect or refuse to become a party to the suit, the court may render judgment against the estate of the deceased party, in the same manner as if the executor or administrator had voluntarily made himself a party to the suit: And the executor or administrator, who shall become a party as aforesaid, shall, upon motion to the court where the suit is depending, be entitled to a continuance of the same until the next term of the said court. And if there

be two or more plaintiffs, or defendants, and one or more of them shall die, if the cause of action shall survive to the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants, the writ or action shall not be thereby abated; but such death being suggested upon the record, the action shall proceed at the suit of the surviving plaintiff or plaintiffs, against the surviving defendant or defendants.

Sec. 32. That no summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any of the courts of the United States, shall be abated, arrested, quashed, or reversed, for any defect or want of form, but the said courts respectively, shall proceed and give judgment according as the right of the cause, and matter in law, shall appear unto them without regarding any imperfections, defects, or want of form in such writ, declaration, or other pleading, return, process, judgment, or course of proceeding whatsoever, except those only in cases of demurrer, which the party demurring shall specially set down and express together, with his demurrer as the cause thereof. And the said courts, respectively, shall and may, by virtue of this act, from time to time, amend all and every such imperfections, defects, and wants of form, other than those only which the party demurring shall express as aforesaid; and may, at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as the said courts, respectively, shall, in their discretion, and by their rules, prescribe.

Sec. 33. That for any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any justice of the peace, or other magistrate of any of the United States, where he may be found, agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States, as by this act has cognizance of the offense: And copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recog-

nizances of the witnesses, for their appearance to testify in the case; which recognizances the magistrate, before whom the examination shall be, may require on pain of imprisonment. And if such commitment of the offender, or the witnesses, shall be in a district other than that in which the offense is to be tried, it shall be the duty of the judge of that district where the delinquent is imprisoned, seasonably to issue, and of the marshal of the same district to execute, a warrant for the removal of the offender, and the witnesses, or either of them, as the case may be, to the district in which the trial is to be had. And upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death, in which cases it shall not be admitted, but by the Supreme or a Circuit Court, or by a justice of the Supreme Court, or a judge of a District Court, who shall exercise their discretion therein, regarding the nature and circumstances of the offense, and of the evidence and the usages of law. And if a person committed by a justice of the Supreme, or a judge of a District Court, for an offense not punishable with death, shall afterwards procure bail, and there be no judge of the United States in the district to take the same, it may be taken by any judge of the Supreme, or Superior Court of law of such State.

Sec. 34. That the laws of the several States, except where the Constitution, treaties, or statutes, of the United States, shall otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.

Sec. 35. That in all the courts of the United States, the parties may plead and manage their own causes personally, or by the assistance of such counsel or attorneys at law, as by the rules of the said courts, respectively, shall be permitted to manage and conduct causes therein. And there shall be appointed, in each district, a meet person, learned in the law, to act as attorney for the United States in such district, who shall be sworn, or affirmed, to the faithful execution of his office, whose duty it shall be to prosecute in such district, all delinquents, for crimes and offenses cognizable under the authority of the United

States, and all civil actions in which the United States shall be concerned, except before the Supreme Court, in the district in which that court shall be holden. And he shall receive as a compensation for his services, such fees as shall be taxed therefor in the respective courts before which the suits or prosecutions shall be. And there shall also be appointed a meet person learned in the law, to act as attorney general for the United States, who shall be sworn, or affirmed, to a faithful execution of his office; whose duty it shall be to prosecute and conduct all suits in the Supreme Court, in which the United States shall be concerned, and to give his advice and opinion upon questions of law, when required by the President of the United States, or when requested by the heads of any of the departments, touching any matters that may concern their departments, and shall receive such compensation for his services, as shall by law be provided.

Approved September 24, 1789.

THE PRESENT LAW AS TO ISSUANCE OF INJUNCTIONS

Sections 17, 18, 19 and 20 of the Act of Congress approved October 15, 1914, entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," which repealed Section 263 Judicial Code, page 817 infra.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

SEC. 17. That no preliminary injunction shall be issued without notice to the opposite party.

No temporary restraining order shall be granted without notice to the opposite party unless it shall clearly appear from specific facts shown by affidavit or by the verified bill that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon. Every such temporary restraining order shall be indorsed with the date and hour of issuance, shall be forthwith filed in the clerk's office and entered of record, shall define the injury and state why it is irreparable and why the order was granted without notice, and shall by its terms expire within such time after entry, not to exceed ten days, as the court or judge may fix, unless within the time so fixed the order is extended for a like period for good cause shown, and the reasons for such extension shall be entered of record. In case a temporary restraining order shall be granted without notice in the contingency specified, the matter of the issuance of a preliminary injunction shall be set down for a hearing at the earliest possible time and shall take precedence of all matters except older matters of the same character; and when the same comes up for hearing the party obtaining the temporary restraining order shall proceed with the application for a preliminary injunction, and if he does not do so the court shall dissolve the temporary restraining order. Upon two days' notice to the party obtaining such temporary restraining order the opposite party may appear and move the dissolution or modification of the order, and in that event the court or judge shall proceed to hear and determine the motion as expeditiously as the ends of justice may require.

Section two hundred and sixty-three of an Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven, is hereby repealed.

Nothing in this section contained shall be deemed to alter, repeal, or amend section two hundred and sixty-six of an Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven.

SEC. 18. That, except as otherwise provided in section 16 of this Act, no restraining order or interlocutory order of injunction shall issue, except upon the giving of security by the applicant in such sum as the court or judge may deem proper, conditioned upon the payment of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained thereby.

SEC. 19. That every order of injunction or restraining order shall set forth the reasons for the issuance of the same, shall be specific in terms, and shall describe in reasonable detail, and not by reference to the bill of complaint or other document, the act or acts sought to be restrained, and shall be binding only upon the parties to the suit, their officers, agents, servants, employees, and attorneys, or those in active concert or participating with them, and who shall, by personal service or otherwise, have received actual notice of the same.

SEC. 20. That no restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

Sections 21 and 22, prescribe the punishment for disobedience of the lawful orders, decrees and process of the District Courts and Judges, the writ of attachment against persons, and sequestration against corporations upon failure to show cause why punishment for contempt should not be imposed for wilful disobedience of any such order, decree or writ, and provides that upon the demand of the accused a jury trial be had in all cases "within the purview of this act." Section 24 excepts from the right of trial by jury contempts committed in disobedience of the orders and decrees of the court in any suit brought in the name of the United States or in its behalf. Where the United States is plaintiff, and in all other cases of contempt not specifically embraced within Section 21, punishment "in conformity to the usages at law and equity now prevailing" is prescribed.

Approved, October 15, 1914.

THE ACT ESTABLISHING THE CIRCUIT COURTS OF APPEALS

An Act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

Sec. 10. That whenever on appeal or writ of error or otherwise a case coming directly from the District Court (or existing Circuit Court) shall be reviewed and determined in the Supreme Court, the cause shall be remanded to the proper District (or Circuit Court) for further proceedings to be taken in pursuance of such determination. And whenever on appeal or writ of error or otherwise, a case coming from a Circuit Court of Appeals shall be reviewed and determined in the Supreme Court, the cause shall be remanded by the Supreme Court to the proper District (or Circuit Court) for further proceedings in pursuance of such determination. Whenever, on appeal or writ of error or otherwise, a case coming from a District (or Circuit Court) shall be reviewed and determined in the Circuit Court of Appeals in a case in which the decision in the Circuit Court of Appeals is final, such cause shall be remanded to the said District (or Circuit Court) for further proceedings, to be there taken in pursuance of such determination.

Sec. 11. That no appeal or writ of error by which any order, judgment or decree may be reviewed in the Circuit Court of Appeals under the provisions of this act shall be taken or sued out, except within six months after the entry of the order, judgment or decree sought to be reviewed: *Provided, however,* that in all cases in which a lesser time is now by law limited for appeals or writs of error, such limits of time shall apply to appeals or writs of error in

such cases taken to or sued out from the Circuit Courts of Appeals. And all provisions of law now in force regulating the methods and system of review, through appeals or writs of error, shall regulate the method and system of appeals and writs of error provided for in this act in respect of the Circuit Courts of Appeals, including all provisions for bonds or other securities to be required and taken on such appeals and writs of error (the remaining portion of the section is now Sec. 132, Judicial Code).

NOTE. All the Act of March 3d, 1891 (26 *Stat. L.* 826), except Section 10 and the foregoing from Section 11 appears to have been superseded by the Judicial Code Act of March 3d, 1911 (36 *Stat. L.*, ch. 231, *U. S. Comp. Stat. Supp.* 1911, p. 128).

AN ACT TO DIMINISH THE EXPENSE OF PROCEEDINGS ON APPEAL AND WRIT OF ERROR OR OF CERTIORARI

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in any cause or proceeding wherein the final judgment or decree is sought to be reviewed on appeal to, or by writ of error from, a United States Circuit Court of Appeals the appellant or plaintiff in error shall cause to be printed under such rules as the lower court shall prescribe, and shall file in the office of the clerk of such Circuit Court of Appeals at least twenty days before the case is called for argument therein, at least twenty-five printed transcripts of the record of the lower court, and of such part or abstract of the proofs as the rules of such Circuit Court of Appeals may require, and in such form as the Supreme Court of the United States shall by rule prescribe, one of which printed transcripts shall be certified under the hand of the clerk of the lower court and under the seal thereof, and shall furnish three copies of such printed transcript to the adverse party at least twenty days before such argument: *Provided,* That either the court below or the Circuit Court of Appeals may order any original document or other evidence to be sent up in addition to the printed copies of the record or in lieu of printed copies of a part thereof; and no written or typewritten transcript of the record shall be required.

Sec. 2. That in any cause or proceeding wherein the final judgment or decree is sought to be reviewed on appeal to or by writ of error or of certiorari from the Supreme Court of the United States, in which the record has been printed and used upon the hearing in the court below and which substantially conforms to the printed record in said Supreme Court, if there have been at the time of filing the record in the court below

twenty-five copies of said printed record, in addition to those provided in the preceding section, lodged with the clerk of the court below, one copy thereof shall be used by the clerk of the court below in the preparation and as a part of the transcript of the record of the court below; and no fee shall be allowed the clerk of the court below in the preparation of the transcript for such part thereof as is included in said printed record so lodged with him. And the clerk of the court below in transmitting the transcript of record to the Supreme Court of the United States for review shall at the same time transmit the remaining uncertified copies of the printed record so lodged with him, which shall be used in the preparation and as a part of the printed record in the Supreme Court of the United States, and the clerk's fee for preparing the record for the printer, indexing the same, supervising the printing and binding and distributing the copies shall be at such rate per folio thereof, exclusive of the printed record so furnished by the clerk of the court below, as the Supreme Court of the United States may from time to time by rule prescribe; and no written or typewritten transcript of so much of the record as shall have been printed as herein provided shall be required.

Approved, February 13, 1911.

NOTE. The Act of Feb. 13th, 1911 (36 *Stat. L.* 901, ch. 47, *U. S. Comp. Stats. Supp.* 1911, p. 275) to diminish the expense of proceedings on appeal, etc., repeals the table of fees prescribed by the Supreme Court as to the fees of the clerk in the cases where appellant causes the transcript of the record to be printed and indexed in the court below and uses those records in the appellate court as allowed by the act, and in such cases the clerk of the Circuit Court of Appeals can make no charge for preparing the record for the printer, etc. *Rainey v. W. R. Grace Company*, 231 U. S. 703, decided January 5, 1914.

AN ACT TO CODIFY, REVISE AND AMEND THE LAWS RELATING TO THE JUDICIARY

Be it enacted by the Senate and House of Representative of the United States of America in Congress assembled, That the laws relating to the judiciary be, and they hereby are, codified, revised, and amended, with title, chapters, head-notes, and sections, entitled, numbered, and to read as follows:

TITLE

THE JUDICIARY

CHAPTER ONE

DISTRICT COURTS—ORGANIZATION

- | Sec. | Sec. |
|--|---|
| 1. District courts established; appointment and residence of judges. | 15. When designation to be made by Chief Justice. |
| 2. Salaries of district judges. | 16. New appointment and revocation. |
| 3. Clerks. | 17. Designation of district judge in aid of another judge. |
| 4. Deputy clerks. | 18. When circuit judge may be designated to hold district court. |
| 5. Criers and bailiffs. | 19. Duty of district and circuit judge in such cases. |
| 6. Records; where kept. | 20. When district judge is interested or related to parties. |
| 7. Effect of altering terms. | 21. When affidavit of personal bias or prejudice of judge is filed. |
| 8. Trials not discontinued by new term. | 22. Continuance in case of vacancy in office. |
| 9. Court always open as courts of admiralty and equity. | 23. Districts having more than one judge; division of business. |
| 10. Monthly adjournments for trial of criminal causes. | |
| 11. Special terms. | |
| 12. Adjournment in case of non-attendance of judge. | |
| 13. Designation of another judge in case of disability of judge. | |
| 14. Designation of another judge in case of an accumulation of business. | |

Sec. 1. In each of the districts described in chapter five, there shall be a court called a district court, for which there

shall be appointed one judge, to be called a district judge; except that in the northern district of California, the northern district of Illinois, the district of Maryland, the district of Minnesota, the district of Nebraska, the district of New Jersey, the eastern district of New York, the northern and southern districts of Ohio, the district of Oregon, the eastern and western districts of Pennsylvania, and the western district of Washington, there shall be an additional district judge in each, and in the southern district of New York, three additional district judges: *Provided*, That whenever a vacancy shall occur in the office of the district judge for the district of Maryland, senior in commission, such vacancy shall not be filled, and thereafter there shall be but one district judge in said district: *Provided further*, That there shall be one judge for the eastern and western districts of South Carolina, one judge for the eastern and middle districts of Tennessee, and one judge for the northern and southern districts of Mississippi: *Provided further*, That the district judge for the middle district of Alabama shall continue as heretofore to be a district judge for the northern district thereof. Every district judge shall reside in the district or one of the districts for which he is appointed, and for offending against this provision shall be deemed guilty of a high misdemeanor.

Sec. 2. Each of the district judges shall receive a salary of six thousand dollars a year, to be paid in monthly installments.

Sec. 3. A clerk shall be appointed for each District Court by the judge thereof, except in cases otherwise provided for by law.

Sec. 4. Except as otherwise specially provided by law, the clerk of the District Court for each district may, with the approval of the district judge thereof, appoint such number of deputy clerks as may be deemed necessary by such judge, who may be designated to reside and maintain offices at such places of holding court as the judge may determine. Such deputies may be removed at the pleasure of the clerk appointing them, with the concurrence of the district judge. In case of the death of the clerk, his deputy or deputies shall, unless removed, continue in office and perform the duties of

the clerk, in his name, until a clerk is appointed and qualified; and for the default or misfeasancess in office of any such deputy, whether in the lifetime of the clerk or after his death, the clerk and his estate and the sureties on his official bond shall be liable; and his executor or administrator shall have such remedy for any such default or misfeasancess committed after his death as the clerk would be entitled to if the same had occurred in his lifetime.

Sec. 5. The District Court for each district may appoint a crier for the court; and the marshal may appoint such number of persons, not exceeding five, as the judge may determine, to wait upon the grand and other juries, and for other necessary purposes.

Sec. 6. The records of a District Court shall be kept at the place where the court is held. When it is held at more than one place in any district and the place of keeping the records is not specially provided by law, they shall be kept at either of the places of holding the court which may be designated by the district judge

Sec. 7. No action, suit, proceeding, or process in any District Court shall abate or be rendered invalid by reason of any act changing the time of holding such court, but the same shall be deemed to be returnable to, pending, and triable in the terms established next after the return day thereof.

Sec. 8. When the trial or hearing of any cause, civil or criminal, in a District Court has been commenced and is in progress before a jury or the court, it shall not be stayed or discontinued by the arrival of the time fixed by law for another session of said court; but the court may proceed therein and bring it to a conclusion in the same manner and with the same effect as if another stated term of the court had not intervened.

Sec. 9. The District Courts, as courts of admiralty and as courts of equity, shall be deemed always open for the purpose of filing any pleading, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, rules, and other proceedings preparatory to the hearing, upon their merits, of all causes pending

therein. Any district judge may, upon reasonable notice to the parties, make, direct, and award, at chambers or in the clerk's office, and in vacation as well as in term, all such process, commissions, orders, rules, and other proceedings, whenever the same are not grantable of course, according to the rules and practice of the court.

Sec. 10. District Courts shall hold monthly adjournments of their regular terms, for the trial of criminal causes, when their business requires it to be done, in order to prevent undue expenses and delays in such cases.

Sec. 11. A special term of any District Court may be held at the same place where any regular term is held, or at such other place in the district as the nature of the business may require, and at such time and upon such notice as may be ordered by the district judge. Any business may be transacted at such special term which might be transacted at a regular term.

Sec. 12. If the judge of any District Court is unable to attend at the commencement of any regular, adjourned, or special term, or any time during such term, the court may be adjourned by the marshal, or clerk, by virtue of a written order directed to him by the judge, to the next regular term, or to any earlier day, as the order may direct.

Sec. 13. When any district judge is prevented, by any disability, from holding any stated or appointed term of his District Court, and that fact is made to appear by the certificate of the clerk, under the seal of the court, to any circuit judge of the circuit in which the district lies, or, in the absence of all the circuit judges, to the circuit justice of the circuit in which the district lies, any such circuit judge or justice may, if in his judgment the public interests so require, designate and appoint the judge of any other district in the same circuit to hold said court, and to discharge all the judicial duties of the judge so disabled, during such disability. Whenever it shall be certified by any such circuit judge or, in his absence, by the circuit justice of the circuit in which the district lies, that for any sufficient reason it is impracticable to designate and appoint a judge of another district within the circuit to perform the duties of such disabled judge,

the chief justice may, if in his judgment the public interests so require, designate and appoint the judge of any district in another circuit to hold said court and to discharge all the judicial duties of the judge so disabled, during such disability. Such appointment shall be filed in the clerk's office, and entered on the minutes of the said District Court, and a certified copy thereof, under the seal of the court, shall be transmitted by the clerk to the judge so designated and appointed.

Sec. 14. When, from the accumulation or urgency of business in any District Court, the public interests require the designation and appointment hereinafter provided, and the fact is made to appear, by the certificate of the clerk, under the seal of the court, to any circuit judge of the circuit in which the district lies, or, in the absence of all the circuit judges, to the circuit justice of the circuit in which the district lies, such circuit judge or justice may designate and appoint the judge of any other district in the same circuit to have and exercise within the district first named the same powers that are vested in the judge thereof. Each of the said district judges may, in case of such appointment, hold separately at the same time a District Court in such district, and discharge all the judicial duties of the district judge therein.

Sec. 15. If all the circuit judges and the circuit justice are absent from the circuit, or are unable to execute the provisions of either of the two preceding sections, or if the district judge so designated is disabled or neglects to hold the court and transact the business for which he is designated, the clerk of the District Court shall certify the fact to the Chief Justice of the United States, who may thereupon designate and appoint in the manner aforesaid the judge of any district within such circuit or within any other circuit; and said appointment shall be transmitted to the clerk and be acted upon by him as directed in the preceding section.

Sec. 16. Any such circuit judge, or circuit justice, or the Chief Justice, as the case may be, may, from time to time, if in his judgment the public interests so require, make a new designation and appointment of any other district judge, in

the manner, for the duties, and with the powers mentioned in the three preceding sections, and revoke any previous designation and appointment.

Sec. 17. It shall be the duty of the senior circuit judge then present in the circuit, whenever in his judgment the public interest so requires, to designate and appoint, in the manner and with the powers provided in section fourteen, the district judge of any judicial district within his circuit to hold a District Court in the place or in aid of any other district judge within the same circuit.

Sec. 18. Whenever, in the judgment of the senior circuit judge of the circuit in which the district lies, or of the circuit justice assigned to such circuit, or of the Chief Justice, the public interest shall require, the said judge, or associate justice, or Chief Justice, shall designate and appoint any circuit judge of the circuit to hold said District Court.

Sec. 19. It shall be the duty of the district or circuit judge who is designated and appointed under either of the six preceding sections, to discharge all the judicial duties for which he is so appointed, during the time for which he is so appointed; and all the acts and proceedings in the courts held by him, or by or before him, in pursuance of said provisions, shall have the same effect and validity as if done by or before the district judge of the said district.

Sec. 20. Whenever it appears that the judge of any District Court is in any way concerned in interest in any suit pending therein, or has been of counsel or is a material witness for either party, or is so related to or connected with either party as to render it improper, in his opinion, for him to sit on the trial, it shall be his duty, on application by either party, to cause the fact to be entered on the records of the court; and also an order that an authenticated copy thereof shall be forthwith certified to the senior circuit judge for said circuit then present in the circuit; and thereupon such proceedings shall be had as are provided in section fourteen.

Sec. 21. Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or

heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in the section last preceding, or chosen in the manner prescribed in section twenty-three, to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. The same proceedings shall be had when the presiding judge shall file with the clerk of the court a certificate that he deems himself unable for any reason to preside with absolute impartiality in the pending suit or action.

Sec. 22. When the office of judge of any District Court becomes vacant, all process, pleadings, and proceedings pending before such court shall, if necessary, be continued by the clerk thereof until such times as a judge shall be appointed, or designated to hold such court; and the judge so designated, while holding such court, shall possess the powers conferred by, and be subject to the provisions contained in, section nineteen.

Sec. 23. In districts having more than one district judge, the judges may agree upon the division of business and assignment of cases for trial in said district; but in case they do not so agree, the senior circuit judge of the circuit in which the district lies, shall make all necessary orders for the division of business and the assignment of cases for trial in said district.

CHAPTER TWO

DISTRICT COURTS—JURISDICTION

Sec.

24. Original jurisdiction.

Par. 1. Where the United States are plaintiffs; and of civil suits at common law or in equity.

2. Of crimes and offenses.
3. Of admiralty causes, seizures, and prizes.
4. Of suits under any law relating to the slave trade.
5. Of cases under internal revenue, customs, and tonnage laws.
6. Of suits under postal laws.
7. Of suits under the patent, the copyright, and the trade-mark laws.
8. Of suits for violation of inter-state commerce laws.
9. Of penalties and forfeitures.
10. Of suits on debentures.
11. Of suits for injuries on account of acts done under laws of the United States.
12. Of suits concerning civil rights.
13. Of suits against persons having knowledge of conspiracy, etc.
14. Of suits to redress the deprivation, under color of law, of civil rights.

Sec.

24. Original jurisdiction—Continued.

Par. 15. Of suits to recover certain offices.

16. Of suits against national-banking associations.
17. Of suits by aliens for torts.
18. Of suits against consuls and vice-consuls.
19. Of suits and proceedings in bankruptcy.
20. Of suits against the United States.
21. Of suits for the unlawful inclosure of public lands.
22. Of suits under immigration and contract-labor laws.
23. Of suits against trusts, monopolies, and unlawful combinations.
24. Of suits concerning allotments of land to Indians.
25. Of partition suits where United States is joint tenant.
26. Appellate jurisdiction under Chinese-exclusion laws.
27. Appellate jurisdiction over Yellowstone National Park.
28. Jurisdiction of crimes on Indian reservations in South Dakota.

Sec. 24. The District Courts shall have original jurisdiction as follows:

First. Of all suits of a civil nature, at common law or in

equity, brought by the United States, or by any officer thereof authorized by law to sue, or between citizens of the same State claiming lands under grants from different States; or, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or (b) is between citizens of different States, or (c) is between citizens of a State and foreign States, citizens, or subjects. No District Court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made: *Provided, however,* That the foregoing provision as to the sum or value of the matter in controversy shall not be construed to apply to any of the cases mentioned in the succeeding paragraphs of this section.

Second. Of all crimes and offenses cognizable under the authority of the United States.

Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it; of all seizures on land or waters not within admiralty and maritime jurisdiction; of all prizes brought into the United States; and of all proceedings for the condemnation of property taken as prize.

Fourth. Of all suits arising under any law relating to the slave trade.

Fifth. Of all cases arising under any law providing for internal revenue, or from revenue from imports or tonnage, except those cases arising under any law providing revenue from imports, jurisdiction of which has been conferred upon the Court of Customs Appeals.

Sixth. Of all cases arising under the postal laws.

Seventh. Of all suits at law or in equity arising under the patent, the copyright, and the trade-mark laws.

Eighth. Of all suits and proceedings arising under any law regulating commerce, except those suits and proceedings exclusive jurisdiction of which has been conferred upon the Commerce Court.

Ninth. Of all suits and proceedings for the enforcement of penalties and forfeitures incurred under any law of the United States.

Tenth. Of all suits by the assignee of any debenture for drawback of duties, issued under any law for the collection of duties, against the person to whom such debenture was originally granted, or against any indorser thereof, to recover the amount of such debenture.

Eleventh. Of all suits brought by any person to recover damages for any injury to his person or property on account of any act done by him, under any law of the United States, for the protection or collection of any of the revenues thereof, or to enforce the right of citizens of the United States to vote in the several States.

Twelfth. Of all suits authorized by law to be brought by any person for the recovery of damages on account of any injury to his person or property, or of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section nineteen hundred and eighty, Revised Statutes.

Thirteenth. Of all suits authorized by law to be brought against any person who, having knowledge that any of the wrongs mentioned in section nineteen hundred and eighty, Revised Statutes, are about to be done, and, having power to prevent or aid in preventing the same, neglects or refuses so to do, to recover damages for any such wrongful act.

Fourteenth. Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage of any State, of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States.

Fifteenth. Of all suits to recover possession of any office, except that of elector of President or Vice President, Representative in or Delegate to Congress, or member of a State legislature, authorized by law to be brought, wherein it appears that the sole question touching the title to such office arises out of the denial of the right to vote to any citizen offering to vote, on account of race, color, or previous condition of servitude: *Provided*, That such jurisdiction shall extend only so far as to determine the rights of the parties to such office by reason of the denial of the right guaranteed by the Constitution of the United States, and secured by any law, to enforce the right of citizens of the United States to vote in all the States.

Sixteenth. Of all cases commenced by the United States, or by direction of any officer thereof, against any national banking association, and cases for winding up the affairs of any such bank; and of all suits brought by any banking association established in the district for which the court is held, under the provisions of title "National Banks," Revised Statutes, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by said title. And all national banking associations established under the laws of the United States shall, for the purposes of all other actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located.

Seventeenth. Of all suits brought by any alien for a tort only, in violation of the laws of nations or of a treaty of the United States.

Eighteenth. Of all suits against consuls and vice consuls.

Nineteenth. Of all matters and proceedings in bankruptcy.

Twentieth. Concurrent with the Court of Claims, of all claims not exceeding ten thousand dollars founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an Executive Department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the

party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, and of all set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court: *Provided, however,* That nothing in this paragraph shall be construed as giving to either the District Courts or the Court of Claims jurisdiction to hear and determine claims growing out of the late Civil War, and commonly known as "war claims," or to hear and determine other claims which had been rejected or reported on adversely prior to the third day of March, eighteen hundred and eighty-seven, by any court, department, or commission authorized to hear and determine the same, or to hear and determine claims for pensions; or as giving to the District Courts jurisdiction of cases brought to recover fees, salary, or compensation for official services of officers of the United States or brought for such purpose by persons claiming as such officers or as assignees or legal representatives thereof; but no suit pending on the twenty-seventh day of June, eighteen hundred and ninety-eight, shall abate or be affected by this provision: *And provided further,* That no suit against the Government of the United States shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made: *Provided,* That the claims of married women, first accrued during marriage, of persons under the age of twenty-one years, first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the suit be brought within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively. All suits brought and tried under the provisions of this paragraph shall be tried by the court without a jury.

Twenty-first. Of proceedings in equity, by writ of injunction, to restrain violations of the provisions of laws of the

United States to prevent the unlawful inclosure of public lands; and it shall be sufficient to give the court jurisdiction if service of original process be had in any civil proceeding on any agent or employee having charge or control of the inclosure.

Twenty-second. Of all suits and proceedings arising under any law regulating the immigration of aliens, or under the contract labor laws.

Twenty-third. Of all suits and proceedings arising under any law to protect trade and commerce against restraints and monopolies.

Twenty-fourth. Of all actions, suits, or proceedings involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty.

Twenty-fifth. Of suits in equity brought by any tenant in common or joint tenant for the partition of lands in cases where the United States is one of such tenants in common or joint tenants, such suits to be brought in the district in which such land is situate.

Sec. 25. The District Courts shall have appellate jurisdiction of the judgments and orders of United States commissioners in cases arising under the Chinese exclusion laws.

Sec. 26. The District Court for the district of Wyoming shall have jurisdiction of all felonies committed within the Yellowstone National Park and appellate jurisdiction of judgments in cases of conviction before the commissioner authorized to be appointed under section five of an Act entitled "An Act to protect the birds and animals in Yellowstone National Park, and to punish crimes in said Park, and for other purposes," approved May seventh, eighteen hundred and ninety-four.

Sec. 27. The District Court of the United States for the district of South Dakota shall have jurisdiction to hear, try, and determine all actions and proceedings in which any person shall be charged with the crime of murder, manslaughter, rape, assault with intent to kill, arson, burglary, larceny, or assault with a dangerous weapon, committed

within the limits of any Indian reservation in the State of South Dakota.

CHAPTER THREE

DISTRICT COURTS—REMOVAL OF CAUSES

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| Sec. | Sec. |
| 28. Removal of suits from State to United States District Courts. | 34. Removal of suits by aliens. |
| 29. Procedure for removal. | 35. When copies of records are refused by clerk of State court. |
| 30. Suits under grants of land from different States. | 36. Previous attachment bonds, orders, etc., remain valid. |
| 31. Removal of causes against persons denied any civil rights, etc. | 37. Suits improperly in District Court may be dismissed or remanded. |
| 32. When petitioner is in actual custody of State court. | 38. Proceedings in suits removed. |
| 33. Suits and prosecutions against revenue officers, etc. | 39. Time for filing record; return of record, how enforced. |

Sec. 28. Any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the District Courts of the United States are given original jurisdiction by this title, which may now be pending or which may hereafter be brought, in any State court, may be removed by the defendant or defendants therein to the District Court of the United States for the proper district. Any other suit of a civil nature, at law or in equity, of which the District Courts of the United States are given jurisdiction by this title, and which are now pending or which may hereafter be brought, in any State court, may be removed into the District Court of the United States for the proper district by the defendant or defendants therein, being non-residents of that State. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the District Court of the United States

for the proper district. And where a suit is now pending, or may hereafter be brought, in any State court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, any defendant, being such citizen of another State, may remove such suit into the District Court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said District Court that from prejudice or local influence he will not be able to obtain justice in such State court, or in any other State court to which the said defendant may, under the laws of the State, have the right, on account of such prejudice or local influence, to remove said cause: *Provided*, That if it further appear that said suit can be fully and justly determined as to the other defendants in the State court, without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, said District Court may direct the suit to be remanded, so far as relates to such other defendants, to the State court, to be proceeded with therein. At any time before the trial of any suit which is now pending in any District Court, or may hereafter be entered therein, and which has been removed to said court from a State court on the affidavit of any party plaintiff that he had reason to believe and did believe that, from prejudice or local influence, he was unable to obtain justice in said State court, the District Court shall, on application of the other party, examine into the truth of said affidavit and the grounds thereof, and, unless it shall appear to the satisfaction of said court that said party will not be able to obtain justice in said State court, it shall cause the same to be remanded thereto. Whenever any cause shall be removed from any State court into any District Court of the United States, and the District Court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the District Court so remanding such cause shall be allowed: *Provided*, That no case arising under an Act entitled "An Act relating to the liability of common carriers

by railroad to their employees in certain cases," approved April twenty-second, nineteen hundred and eight, or any amendment thereto, and brought in any State court of competent jurisdiction shall be removed to any court of the United States.

Sec. 29. Whenever any party entitled to remove any suit mentioned in the last preceding section, except suits removable on the ground of prejudice or local influence, may desire to remove such suit from a State court to the District Court of the United States, he may make and file a petition, duly verified, in such suit in such State court at the time, or any time before the defendant is required by the laws of the State or the rule of the State court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the District Court to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such District Court, within thirty days from the date of filing said petition, a certified copy of the record in such suit, and for paying all costs that may be awarded by the said District Court if said District Court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit if special bail was originally requisite therein. It shall then be the duty of the State court to accept said petition and bond and proceed no further in such suit. Written notice of said petition and bond for removal shall be given the adverse party or parties prior to filing the same. The said copy being entered within said thirty days as aforesaid in said District Court of the United States, the parties so removing the said cause shall, within thirty days thereafter, plead, answer, or demur to the declaration or complaint in said cause, and the cause shall then proceed in the same manner as if it had been originally commenced in the said District Court.

Sec. 30. If in any action commenced in a State court the title of land be concerned, and the parties are citizens of the same State and the matter in dispute exceeds the sum or value of three thousand dollars, exclusive of interest and

costs, the sum or value being made to appear, one or more of the plaintiffs or defendants, before the trial, may state to the court, and make affidavit if the court require it, that he or they claim, and shall rely upon, a right or title to the land under a grant from a State, and produce the original grant, or an exemplification of it, except where the loss of public records shall put it out of his or their power, and shall move that any one or more of the adverse party inform the court whether he or they claim a right or title to the land under a grant from some other State, the party or parties so required shall give such information, or otherwise not be allowed to plead such grant or give it in evidence upon the trial. If he or they inform the court that he or they do claim under such grant, any one or more of the party moving for such information may then, on petition and bond, as hereinbefore mentioned in this chapter, remove the cause for trial to the District Court of the United States next to be holden in such district; and any one of either party removing the cause shall not be allowed to plead or give evidence of any other title than that by him or them stated as aforesaid as the ground of his or their claim.

Sec. 31. When any civil suit or criminal prosecution is commenced in any State court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, or against any officer, civil or military, or other person, for any arrest or imprisonment or other trespasses or wrongs made or committed by virtue of or under color of authority derived from any law providing for equal rights as aforesaid, or for refusing to do any act on the ground that it would be inconsistent with such law, such suit or prosecution may, upon the petition of such defendant, filed in said State court at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed for trial into the next District Court to be held in the district where it is pending. Upon the filing of such

petition all further proceedings in the State courts shall cease, and shall not be resumed except as hereinafter provided. But all bail and other security given in such suit or prosecution shall continue in like force and effect as if the same had proceeded to final judgment and execution in the State court. It shall be the duty of the clerk of the State court to furnish such defendant, petitioning for a removal, copies of said process against him, and of all pleadings, depositions, testimony, and other proceedings in the case. If such copies are filed by said petitioner in the District Court on the first day of its session, the cause shall proceed therein in the same manner as if it had been brought there by original process; and if the said clerk refuses or neglects to furnish such copies, the petitioner may thereupon docket the case in the District Court, and the said court shall then have jurisdiction therein, and may, upon proof of such refusal or neglect of said clerk, and upon reasonable notice to the plaintiff, require the plaintiff to file a declaration, petition, or complaint in the cause; and, in case of his default, may order a nonsuit and dismiss the case at the costs of the plaintiff, and such dismissal shall be a bar to any further suit touching the matter in controversy. But if, without such refusal or neglect of said clerk to furnish such copies and proof thereof, the petitioner for removal fails to file copies in the District Court, as herein provided, a certificate, under the seal of the District Court, stating such failure, shall be given, and upon the production thereof in said State court the cause shall proceed therein as if no petition for removal had been filed.

Sec. 32. When all the acts necessary for the removal of any suit or prosecution, as provided in the preceding section, have been performed, and the defendant petitioning for such removal is in actual custody on process issued by said State court, it shall be the duty of the clerk of said District Court to issue a writ of habeas corpus cum causa, and of the marshal, by virtue of said writ, to take the body of the defendant into his custody, to be dealt with in said District Court according to law and the orders of said court, or, in vacation, of any judge thereof; and the marshal shall file with or

deliver to the clerk of said State court a duplicate copy of said writ.

Sec. 33. When any civil suit or criminal prosecution is commenced in any court of a State against any officer appointed under or acting by authority of any revenue law of the United States now or hereafter enacted, or against any person acting under or by authority of any such officer, on account of any act done under color of his office or of any such law, or on account of any right, title, or authority claimed by such officer or other person under any such law; or is commenced against any person holding property or estate by title derived from any such officer, and affects the validity of any such revenue law; or when any suit is commenced against any person for or on account of anything done by him while an officer of either House of Congress in the discharge of his official duty, in executing any order of such House, the said suit or prosecution may, at any time before the trial or final hearing thereof, be removed for trial into the District Court next to be holden in the district where the same is pending, upon the petition of such defendant to said District Court, and in the following manner: Said petition shall set forth the nature of the suit or prosecution and be verified by affidavit, and, together with a certificate signed by an attorney or counselor at law of some court of record of the State where such suit or prosecution is commenced, or of the United States, stating that, as counsel for the petitioner, he has examined the proceedings against him and carefully inquired into all the matters set forth in the petition, and that he believes them to be true, shall be presented to the said District Court, if in session, or if it be not, to the clerk thereof at his office, and shall be filed in said office. The cause shall thereupon be entered on the docket of the District Court, and shall proceed as a cause originally commenced in that court; but all bail and other security given upon such suit or prosecution shall continue in like force and effect as if the same had proceeded to final judgment and execution in the State court. When the suit is commenced in the State court by summons, subpoena, petition, or other process except capias, the clerk of the District Court shall issue a

writ of certiorari to the State court, requiring it to send to the District Court the record and proceedings in the cause. When it is commenced by *capias* or by any other similar form or proceeding by which a personal arrest is ordered, he shall issue a writ of *habeas corpus cum causa*, a duplicate of which shall be delivered to the clerk of the State court, or left at his office, by the marshal of the district or his deputy, or by some person duly authorized thereto; and thereupon it shall be the duty of the State court to stay all further proceedings in the cause, and the suit or prosecution, upon delivery of such process, or leaving the same as aforesaid, shall be held to be removed to the District Court, and any further proceedings, trial, or judgment therein in the State court shall be void. If the defendant in the suit or prosecution be in actual custody on mesne process therein, it shall be the duty of the marshal, by virtue of the writ of *habeas corpus cum causa*, to take the body of the defendant into his custody, to be dealt with in the cause according to law and the order of the District Court, or, in vacation, of any judge thereof; and if, upon the removal of such suit or prosecution, it is made to appear to the District Court that no copy of the record and proceedings therein in the State court can be obtained, the District Court may allow and require the plaintiff to proceed *de novo* and to file a declaration of his cause of action, and the parties may thereupon proceed as in actions originally brought in said District Court. On failure of the plaintiff so to proceed, judgment of non *prosequitur* may be rendered against him, with costs for the defendant.

Sec. 34. Whenever a personal action has been or shall be brought in any State court by an alien against any citizen of a State who is, or at the time the alleged action accrued was, a civil officer of the United States, being a non-resident of that State wherein jurisdiction is obtained by the State court, by personal service of process, such action may be removed into the District Court of the United States in and for the district in which the defendant shall have been served with the process, in the same manner as now provided for the removal of an action brought in a State court by the provisions of the preceding section.

Sec. 35. In any case where a party is entitled to copies of the records and proceedings in any suit or prosecution in a State court, to be used in any court of the United States, if the clerk of said State court, upon demand, and the payment or tender of the legal fees, refuses or neglects to deliver to him certified copies of such records and proceedings, the court of the United States in which such records and proceedings are needed may, on proof by affidavit that the clerk of said State court has refused or neglected to deliver copies thereof, on demand as aforesaid, direct such record to be supplied by affidavit or otherwise, as the circumstances of the case may require and allow; and thereupon such proceeding, trial, and judgment may be had in the said court of the United States, and all such processes awarded, as if certified copies of such records and proceedings had been regularly before the said court.

Sec. 36. When any suit shall be removed from a State court to a District Court of the United States, any attachment or sequestration of the goods or estate of the defendant had in such suit in the State court shall hold the goods or estate so attached or sequestered to answer the final judgment or decree in the same manner as by law they would have been held to answer final judgment or decree had it been rendered by the court in which said suit was commenced. All bonds, undertakings, or security given by either party in such suit prior to its removal shall remain valid and effectual notwithstanding said removal; and all injunctions, orders, and other proceedings had in such suit prior to its removal shall remain in full force and effect until dissolved or modified by the court to which such suit shall be removed.

Sec. 37. If in any suit commenced in a District Court, or removed from a State court to a District Court of the United States, it shall appear to the satisfaction of the said District Court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said District Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of

creating a case cognizable or removable under this chapter, the said District Court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just.

Sec. 38. The District Court of the United States shall, in all suits removed under the provisions of this chapter, proceed therein as if the suit had been originally commenced in said District Court, and the same proceedings had been taken in such suit in said District Court as shall have been had therein in said State court prior to its removal.

Sec. 39. In all causes removable under this chapter, if the clerk of the State court in which any such cause shall be pending shall refuse to any one or more of the parties or persons applying to remove the same, a copy of the record therein, after tender of legal fees for such copy, said clerk so offending shall, on conviction thereof in the District Court of the United States to which said action or proceeding was removed, be fined not more than one thousand dollars, or imprisoned not more than one year, or both. The District Court to which any cause shall be removable under this chapter shall have power to issue a writ of certiorari to said State court commanding said State court to make return of the record in any such cause removed as aforesaid, or in which any one or more of the plaintiffs or defendants have complied with the provisions of this chapter for the removal of the same, and enforce said writ according to law. If it shall be impossible for the parties or persons removing any cause under this chapter, or complying with the provisions for the removal thereof, to obtain such copy, for the reason that the clerk of said State court refuses to furnish a copy, on payment of legal fees, or for any other reason, the District Court shall make an order requiring the prosecutor in any such action or proceeding to enforce forfeiture or recover penalty, as aforesaid, to file a copy of the paper or proceeding by which the same was commenced, within such time as the court may determine; and in default thereof the court shall dismiss the said action or proceeding; but if said order shall be complied with, then said District Court shall require the

other party to plead, and said action or proceeding shall proceed to final judgment. The said District Court may make an order requiring the parties thereto to plead de novo; and the bond given, conditioned as aforesaid, shall be discharged so far as it requires copy of the record to be filed as aforesaid.

CHAPTER FOUR

DISTRICT COURTS—MISCELLANEOUS PROVISIONS

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| <p>Sec.</p> <p>40. Capital cases; where triable.</p> <p>41. Offenses on the high seas, etc., where triable.</p> <p>42. Offenses begun in one district and completed in another.</p> <p>43. Suits for penalties and forfeitures, where brought.</p> <p>44. Suits for internal-revenue taxes, where brought.</p> <p>45. Seizures, where cognizable.</p> <p>46. Capture of insurrectionary property, where cognizable.</p> <p>47. Certain seizures cognizable in any district into which the property is taken.</p> <p>48. Jurisdiction in patent cases.</p> <p>49. Proceedings to enjoin Comptroller of the Currency.</p> <p>50. When a part of several defendants cannot be served.</p> <p>51. Civil suits; where to be brought.</p> <p>52. Suits in States containing more than one district.</p> <p>53. Districts containing more than one division; where suit to be brought; transfer of criminal cases.</p> <p>54. Suits of a local nature, where to be brought.</p> <p>55. When property lies in different districts in same State.</p> <p>56. When property lies in different States in same circuit; jurisdiction of receiver.</p> | <p>Sec.</p> <p>57. Absent defendants in suits to enforce liens, remove clouds on titles, etc.</p> <p>58. Civil causes may be transferred to another division of district by agreement.</p> <p>59. Upon creation of new district or division, where prosecution to be instituted or action brought.</p> <p>60. Creation of new district, or transfer of territory not to divest lien; how lien to be enforced.</p> <p>61. Commissioners to administer oaths to appraisers.</p> <p>62. Transfer of records to district court when a Territory becomes a State.</p> <p>63. District judge shall demand and compel delivery of records of territorial court.</p> <p>64. Jurisdiction of district courts in cases transferred from territorial courts.</p> <p>65. Receivers to manage property according to State laws.</p> <p>66. Suits against receiver.</p> <p>67. Certain persons not to be appointed or employed as officers of courts.</p> <p>68. Certain persons not to be masters or receivers.</p> |
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Sec. 40. The trial of offenses punishable with death shall be had in the county where the offense was committed, where that can be done without great inconvenience.

Sec. 41. The trial of all offenses committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district where the offender is found, or into which he is first brought.

Sec. 42. When any offense against the United States is begun in one Judicial District and completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined, and punished in either district, in the same manner as if it had been actually and wholly committed therein.

Sec. 43. All pecuniary penalties and forfeitures may be sued for and recovered either in the district where they accrue or in the district where the offender is found.

Sec. 44. Taxes accruing under any law providing internal revenue may be sued for and recovered either in the district where the liability for such tax occurs or in the district where the delinquent resides.

Sec. 45. Proceedings on seizures made on the high seas, for forfeiture under any law of the United States, may be prosecuted in any district into which the property so seized is brought, and proceedings instituted. Proceedings on such seizures made within any district shall be prosecuted in the district where the seizure is made, except in cases where it is otherwise provided.

Sec. 46. Proceedings for the condemnation of any property captured, whether on the high seas or elsewhere out of the limits of any judicial district, or within any district, on account of its being purchased or acquired, sold or given, with intent to use or employ the same, or to suffer it to be used or employed, in aiding, abetting, or promoting any insurrection against the Government of the United States, or knowingly so used or employed by the owner thereof, or with his consent, may be prosecuted in any district where the same may be seized, or into which it may be taken and proceedings first instituted.

Sec. 47. Proceedings on seizures for forfeiture of any vessel

or cargo entering any port of entry which has been closed by the President in pursuance of law, or of goods and chattels coming from a State or section declared by proclamation of the President to be in insurrection into other parts of the United States, or of any vessel or vehicle conveying such property, or conveying persons to or from such State or section, or of any vessel belonging, in whole or in part, to any inhabitant of such State or section, may be prosecuted in any district into which the property so seized may be taken and proceedings instituted; and the District Court thereof shall have as full jurisdiction over such proceedings as if the seizure was made in that district.

Sec. 48. In suits brought for the infringement of letters patent the District Courts of the United States shall have jurisdiction, in law or in equity, in the district of which the defendant is an inhabitant, or in any district in which the defendant, whether a person, partnership, or corporation, shall have committed acts of infringement and have a regular and established place of business. If such suit is brought in a district of which the defendant is not an inhabitant, but in which such defendant has a regular and established place of business, service of process, summons, or subpoena upon the defendant may be made by service upon the agent or agents engaged in conducting such business in the district in which suit is brought.

Sec. 49. All proceedings by any national banking association to enjoin the Comptroller of the Currency, under the provisions of any law relating to national banking associations, shall be had in the district where such association is located.

Sec. 50. When there are several defendants in any suit at law or in equity, and one or more of them are neither inhabitants of nor found within the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction, and proceed to the trial and adjudication of the suit between the parties who are properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process nor voluntarily appearing to answer; and non-joinder

of parties who are not inhabitants of nor found within the district, as aforesaid, shall not constitute matter of abatement or objection to the suit.

Sec. 51. Except as provided in the five succeeding sections, no person shall be arrested in one district for trial in another, in any civil action before a District Court; and, except as provided in the six succeeding sections, no civil suit shall be brought in any District Court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant.

Sec. 52. When a State contains more than one district, every suit not of a local nature, in the District Court thereof, against a single defendant, inhabitant of such State, must be brought in the district where he resides; but if there are two or more defendants, residing in different districts of the State, it may be brought in either district, and a duplicate writ may be issued against the defendants, directed to the marshal of any other district in which any defendant resides. The clerk issuing the duplicate writ shall indorse thereon that it is a true copy of a writ sued out of the court of the proper district; and such original and duplicate writs, when executed and returned into the office from which they issue, shall constitute and be proceeded on as one suit; and upon any judgment or decree rendered therein, execution may be issued, directed to the marshal of any district in the same State.

Sec. 53. When a district contains more than one division, every suit not of a local nature against a single defendant must be brought in the division where he resides; but if there are two or more defendants residing in different divisions of the district it may be brought in either division. All mesne and final process subject to the provisions of this section may be served and executed in any or all of the divisions of the district, or if the State contains more than one district, then in any of such districts, as provided in the preceding section. All prosecutions for crimes or offenses shall be had within the division of such districts where the same were committed,

unless the court, or the judge thereof, upon the application of the defendant, shall order the cause to be transferred for prosecution to another division of the district. When a transfer is ordered by the court or judge, all the papers in the case, or certified copies thereof, shall be transmitted by the clerk, under the seal of the court, to the division to which the cause is so ordered transferred; and thereupon the cause shall be proceeded with in said division in the same manner as if the offense had been committed therein. In all cases of the removal of suits from the courts of a State to the District Court of the United States such removal shall be to the United States District Court in the division in which the county is situated from which the removal is made; and the time within which the removal shall be perfected, in so far as it refers to or is regulated by the terms of United States courts, shall be deemed to refer to the terms of the United States District Court in such division.

Sec. 54. In suits of a local nature, where the defendant resides in a different district, in the same State, from that in which the suit is brought, the plaintiff may have original and final process against him, directed to the marshal of the district in which he resides.

Sec. 55. Any suit of a local nature, at law or in equity, where the land or other subject-matter of a fixed character lies partly in one district and partly in another, within the same State, may be brought in the District Court of either district; and the court in which it is brought shall have jurisdiction to hear and decide it, and to cause mesne or final process to be issued and executed, as fully as if the said subject-matter were wholly within the district for which such court is constituted.

Sec. 56. Where in any suit in which a receiver shall be appointed the land or other property of a fixed character, the subject of the suit, lies within different States in the same judicial circuit, the receiver so appointed shall, upon giving bond as required by the court, immediately be vested with full jurisdiction and control over all the property, the subject of the suit, lying or being within such circuit; subject, however, to the disapproval of such order, within thirty days

thereafter, by the Circuit Court of Appeals for such circuit, or by a circuit judge thereof, after reasonable notice to adverse parties and an opportunity to be heard upon the motion for such disapproval; and subject, also, to the filing and entering in the District Court for each district of the circuit in which any portion of the property may lie or be, within ten days thereafter, of a duly certified copy of the bill and of the order of appointment. The disapproval of such appointment within such thirty days, or the failure to file such certified copy of the bill and order of appointment within ten days, as herein required, shall divest such receiver of jurisdiction over all such property except that portion thereof lying or being within the State in which the suit is brought. In any case coming within the provisions of this section, in which a receiver shall be appointed, process may issue and be executed within any district of the circuit in the same manner and to the same extent as if the property were wholly within the same district; but orders affecting such property shall be entered of record in each district in which the property affected may lie or be.

Sec. 57. When in any suit commenced in any District Court of the United States to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks. In case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some

further time, to be allowed by the court, in its discretion, and upon proof of the service or publication of said order and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district; and when a part of the said real or personal property against which such proceedings shall be taken shall be within another district, but within the same State, such suit may be brought in either district in said State: *Provided, however,* That any defendant or defendants not actually personally notified as above provided may, at any time within one year after final judgment in any suit mentioned in this section, enter his appearance in said suit in said District Court, and thereupon the said court shall make an order setting aside the judgment therein and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the court shall deem just; and thereupon said suit shall be proceeded with to final judgment according to law.

Sec. 58. Any civil cause, at law or in equity, may, on written stipulation of the parties or of their attorneys of record signed and filed with the papers in the case, in vacation or in term, and on the written order of the judge signed and filed in the case in vacation or on the order of the court duly entered of record in term, be transferred to the court of any other division of the same district, without regard to the residence of the defendants, for trial. When a cause shall be ordered to be transferred to a court in any other division, it shall be the duty of the clerk of the court from which the transfer is made to carefully transmit to the clerk of the court to which the transfer is made the entire file of papers in the cause and all documents and deposits in his court pertaining thereto, together with a certified transcript of the records of all orders, interlocutory decrees, or other

entries in the cause; and he shall certify, under the seal of the court, that the papers sent are all which are on file in said court belonging to the cause; for the performance of which duties said clerk so transmitting and certifying shall receive the same fees as are now allowed by law for similar services, to be taxed in the bill of costs, and regularly collected with the other costs in the cause; and such transcript, when so certified and received, shall henceforth constitute a part of the record of the cause in the court to which the transfer shall be made. The clerk receiving such transcript and original papers shall file the same and the case shall then proceed to final disposition as other cases of a like nature.

Sec. 59. Whenever any new district or division has been or shall be established, or any county or territory has been or shall be transferred from one district or division to another district or division, prosecutions for crimes and offenses committed within such district, division, county, or territory prior to such transfer, shall be commenced and proceeded with the same as if such new district or division had not been created, or such county or territory had not been transferred, unless the court, upon the application of the defendant, shall order the cause to be removed to the new district or division for trial. Civil actions pending at the time of the creation of any such district or division, or the transfer of any such county or territory, and arising within the district or division so created or the county or territory so transferred, shall be tried in the district or division as it existed at the time of the institution of the action, or in the district or division so created, or to which the county or territory is or shall be so transferred, as may be agreed upon by the parties, or as the court shall direct. The transfer of such prosecutions and actions shall be made in the manner provided in the section last preceding.

Sec. 60. The creation of a new district or division, or the transfer of any county or territory from one district or division to another district or division, shall not affect or divest any lien theretofore acquired in the Circuit or District Court by virtue of a decree, judgment, execution, attachment, seizure, or otherwise, upon property situated or being within

the district or division so created, or the county or territory so transferred. To enforce any such lien, the clerk of the court in which the same is acquired, upon the request and at the cost of the party desiring the same, shall make a true and certified copy of the record thereof, which, when so made and certified, and filed in the proper court of the district or division in which such property is situated or shall be, after such transfer, shall constitute the record of such lien in such court, and shall be evidence in all courts and places equally with the original thereof; and thereafter like proceedings shall be had thereon, and with the same effect, as though the cause or proceeding had been originally instituted in such court. The provisions of this section shall apply not only in all cases where a district or division is created, or a county or any territory is transferred by this or any future Act, but also in all cases where a district or division has been created, or a county or any territory has been transferred by any law heretofore enacted.

Sec. 61. Any district judge may appoint commissioners, before whom appraisers of vessels or goods and merchandise seized for breaches of any law of the United States, may be sworn; and such oaths, so taken, shall be as effectual as if taken before the judge in open court.

Sec. 62. When any Territory is admitted as a State, and a District Court is established therein, all the records of the proceedings in the several cases pending in the highest court of said Territory at the time of such admission, and all records of the proceedings in the several cases in which judgments or decrees had been rendered in said territorial court before that time, and from which writs of error could have been sued out or appeals could have been taken, or from which writs of error had been sued out or appeals had been taken and prosecuted to the Supreme Court or to the Circuit Court of Appeals, shall be transferred to and deposited in the District Court for the said State.

Sec. 63. It shall be the duty of the district judge, in the case provided in the preceding section, to demand of the clerk, or other person having possession or custody of the records therein mentioned, the delivery thereof, to be de-

posited in said District Court; and in case of the refusal of such clerk or person to comply with such demand, the said district judge shall compel the delivery of such records by attachment or otherwise, according to law.

Sec. 64. When any Territory is admitted as a State, and a District Court is established therein, the said District Court shall take cognizance of all cases which were pending and undetermined in the trial courts of such Territory, from the judgments or decrees to be rendered in which writs of error could have been sued out or appeals taken to the Supreme Court or to the Circuit Court of Appeals, and shall proceed to hear and determine the same.

Sec. 65. Whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the State in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof. Any receiver or manager who shall willfully violate any provision of this section shall be fined not more than three thousand dollars, or imprisoned not more than one year, or both.

Sec. 66. Every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such manager or receiver was appointed so far as the same may be necessary to the ends of justice.

Sec. 67. No person shall be appointed to or employed in any office or duty in any court who is related by affinity or consanguinity within the degree of first cousin to the judge of such court.

Sec. 68. No clerk of a District Court of the United States or his deputy shall be appointed a receiver or master in any case, except where the judge of said court shall determine

that special reasons exist therefor, to be assigned in the order of appointment.

[Chapter 5 describes the boundaries of the several judicial districts and is omitted.]

CHAPTER SIX

CIRCUIT COURTS OF APPEALS

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| Sec. | Sec. |
| 116. Circuits. | 128. Jurisdiction; when judgment final. |
| 117. Circuit Courts of Appeals. | 129. Appeals in proceedings for injunctions and receivers. |
| 118. Circuit judges. | 130. Appellate and supervisory jurisdiction under the bankrupt act. |
| 119. Allotment of justices to the circuits. | 131. Appeals from the United States court for China. |
| 120. Chief justice and associate justices of Supreme Court, and district judges, may sit in Circuit Court of Appeals. | 132. Allowance of appeals, etc. |
| 121. Justices allotted to circuits, how designated. | 133. Writs of error and appeals from the Supreme Courts of Arizona and New Mexico. |
| 122. Seals, forms of process, and rules. | 134. Writs of error and appeals from District Court for Alaska to Circuit Court of Appeals for ninth circuit; court may certify questions to the Supreme Court. |
| 123. Marshals. | 135. Appeals and writs of error from Alaska; where heard. |
| 124. Clerks. | |
| 125. Deputy clerks; appointment and removal. | |
| 126. Terms. | |
| 127. Rooms for court, how provided. | |

Sec. 116. There shall be nine Judicial Circuits of the United States, constituted as follows:

First. The first circuit shall include the districts of Rhode Island, Massachusetts, New Hampshire, and Maine.

Second. The second circuit shall include the districts of Vermont, Connecticut, and New York.

Third. The third circuit shall include the districts of Pennsylvania, New Jersey, and Delaware.

Fourth. The fourth circuit shall include the districts of Maryland, Virginia, West Virginia, North Carolina, and South Carolina.

Fifth. The fifth circuit shall include the districts of Georgia, Florida, Alabama, Mississippi, Louisiana, and Texas.

Sixth. The sixth circuit shall include the districts of Ohio, Michigan, Kentucky, and Tennessee.

Seventh. The seventh circuit shall include the districts of Indiana, Illinois, and Wisconsin.

Eighth. The eighth circuit shall include the districts of Nebraska, Minnesota, Iowa, Missouri, Kansas, Arkansas, Colorado, Wyoming, North Dakota, South Dakota, Utah, and Oklahoma.

Ninth. The ninth circuit shall include the districts of California, Oregon, Nevada, Washington, Idaho, Montana, and Hawaii.

Sec. 117. There shall be in each circuit a Circuit Court of Appeals, which shall consist of three judges, of whom two shall constitute a quorum, and which shall be a court of record, with appellate jurisdiction, as hereinafter limited and established.

Sec. 118. There shall be in the second, seventh, and eighth circuits, respectively, four circuit judges, in the fourth circuit, two circuit judges, and in each of the other circuits, three circuit judges, to be appointed by the President, by and with the advice and consent of the Senate. They shall be entitled to receive a salary at the rate of seven thousand dollars a year, each, payable monthly. Each circuit judge shall reside within his circuit.

Sec. 119. The Chief Justice and associate justices of the Supreme Court shall be allotted among the circuits by an order of the court, and a new allotment shall be made whenever it becomes necessary or convenient by reason of the alteration of any circuit, or of the new appointment of a Chief Justice or associate justice, or otherwise. If a new allotment becomes necessary at any other time than during a term, it shall be made by the Chief Justice, and shall be binding until the next term and until a new allotment by the court. Whenever, by reason of death or resignation, no justice is allotted to a circuit, the Chief Justice may, until a justice is regularly allotted thereto, temporarily assign a justice of another circuit to such circuit.

Sec. 120. The Chief Justice and the associate justices of the Supreme Court assigned to each circuit, and the several district judges within each circuit, shall be competent to sit as judges of the Circuit Court of Appeals within their respective circuits. In case the Chief Justice or an associate justice of the Supreme Court shall attend at any session of the Circuit Court of Appeals, he shall preside. In the absence of such Chief Justice, or associate justice, the circuit judges in attendance upon the court shall preside in the order of the seniority of their respective commissions. In case the full court at any time shall not be made up by the attendance of the Chief Justice or the associate justice, and the circuit judges, one or more district judges within the circuit shall sit in the court according to such order or provision among the district judges as either by general or particular assignment shall be designated by the court: *Provided*, That no judge before whom a cause or question may have been tried or heard in a District Court, or existing Circuit Court, shall sit on the trial or hearing of such cause or question in the Circuit Court of Appeals.

Sec. 121. The words "circuit justice" and "justice of a circuit," when used in this title, shall be understood to designate the justice of the Supreme Court who is allotted to any circuit; but the word "judge," when applied generally to any circuit, shall be understood to include such justice.

Sec. 122. Each of said Circuit Courts of Appeals shall prescribe the form and style of its seal, and the form of writs and other process and procedure as may be conformable to the exercise of its jurisdiction; and shall have power to establish all rules and regulations for the conduct of the business of the court within its jurisdiction as conferred by law.

Sec. 123. The United States marshals in and for the several districts of said courts shall be the marshals of said Circuit Courts of Appeals, and shall exercise the same powers and perform the same duties, under the regulations of the court, as are exercised and performed by the marshal of the Supreme Court of the United States, so far as the same may be applicable.

Sec. 124. Each court shall appoint a clerk, who shall

exercise the same powers and perform the same duties in regard to all matters within its jurisdiction, as are exercised and performed by the clerk of the Supreme Court, so far as the same may be applicable.

Sec. 125. The clerk of the Circuit Court of Appeals for each circuit may, with the approval of the court, appoint such number of deputy clerks as the court may deem necessary. Such deputies may be removed at the pleasure of the clerk appointing them, with the approval of the court. In case of the death of the clerk his deputy or deputies shall, unless removed by the court, continue in office and perform the duties of the clerk in his name until a clerk is appointed and has qualified; and for the defaults or misfeasances in office of any such deputy, whether in the lifetime of the clerk or after his death, the clerk and his estate and the sureties on his official bond shall be liable, and his executor or administrator shall have such remedy for such defaults or misfeasances committed after his death as the clerk would be entitled to if the same had occurred in his lifetime.

Sec. 126. A term shall be held annually by the Circuit Courts of Appeals in the several judicial circuits at the following places, and at such times as may be fixed by said courts, respectively: In the first circuit, in Boston; in the second circuit, in New York; in the third circuit, in Philadelphia; in the fourth circuit, in Richmond; in the fifth circuit, in New Orleans, Atlanta, Fort Worth, and Montgomery; in the sixth circuit, in Cincinnati; in the seventh circuit, in Chicago; in the eighth circuit, in Saint Louis, Denver or Cheyenne, and Saint Paul; in the ninth circuit, in San Francisco, and each year in two other places in said circuit to be designated by the judges of said court; and in each of the above circuits, terms may be held at such other times and in such other places as said courts, respectively, may from time to time designate: *Provided*, That terms shall be held in Atlanta on the first Monday in October, in Fort Worth on the first Monday in November, in Montgomery on the third Monday in October, in Denver or in Cheyenne on the first Monday in September, and in Saint Paul on the first Monday in May. All appeals, writs of error, and other appellate

proceedings which may be taken or prosecuted from the District Courts of the United States in the State of Georgia, in the State of Texas, and in the State of Alabama, to the Circuit Court of Appeals for the fifth Judicial Circuit shall be heard and disposed of, respectively, by said court at the terms held in Atlanta, in Fort Worth, and in Montgomery, except that appeals or writs of error in cases of injunctions and in all other cases which, under the statutes and rules, or in the opinion of the court, are entitled to be brought to a speedy hearing may be heard and disposed of wherever said court may be sitting. All appeals, writs of errors, and other appellate proceedings which may hereafter be taken or prosecuted from the District Court of the United States at Beaumont, Texas, to the Circuit Court of Appeals for the fifth circuit, shall be heard and disposed of by the said Circuit Court of Appeals at the terms of court held at New Orleans: *Provided*, That nothing herein shall prevent the court from hearing appeals or writs of error wherever the said courts shall sit, in cases of injunctions and in all other cases which, under the statutes and the rules, or in the opinion of the court, are entitled to be brought to a speedy hearing. All appeals, writs of error, and other appellate proceedings which may be taken or prosecuted from the District Courts of the United States in the States of Colorado, Utah, and Wyoming, and the Supreme Court of the Territory of New Mexico to the Circuit Court of Appeals for the eighth judicial circuit, shall be heard and disposed of by said court at the terms held either in Denver or in Cheyenne, except that any case arising in any of said States or Territory may, by consent of all the parties, be heard and disposed of at a term of said court other than the one held in Denver or Cheyenne.

Sec. 127. The marshals for the several districts in which said Circuit Courts of Appeals may be held shall, under the direction of the Attorney General, and with his approval, provide such rooms in the public buildings of the United States as may be necessary for the business of said courts, and pay all incidental expenses of said court, including criers, bailiffs, and messengers: *Provided*, That in case proper rooms cannot be provided in such buildings, then the mar-

shals, with the approval of the Attorney General, may, from time to time, lease such rooms as may be necessary for such courts.

Sec. 128. The Circuit Courts of Appeals shall exercise appellate jurisdiction to review by appeal or writ of error final decisions in the District Courts, including the United States District Court for Hawaii, in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court, as provided in section two hundred and thirty-eight, unless otherwise provided by law; and, except as provided in sections two hundred and thirty-nine and two hundred and forty, the judgments and decrees of the Circuit Courts of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different States; also in all cases arising under the patent laws, under the copyright laws, under the revenue laws, and under the criminal laws, and in admiralty cases.

Sec. 129. Where upon a hearing in equity in a District Court, or by a judge thereof in vacation, an injunction shall be granted, continued, refused, or dissolved by an interlocutory order or decree, or an application to dissolve an injunction shall be refused, or an interlocutory order or decree shall be made appointing a receiver, an appeal may be taken from such interlocutory order or decree granting, continuing, refusing, dissolving, or refusing to dissolve, an injunction, or appointing a receiver, to the Circuit Court of Appeals, notwithstanding an appeal in such case might, upon final decree under the statutes regulating the same, be taken directly to the Supreme Court: *Provided*, That the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed unless otherwise ordered by that court, or the appellate court, or a judge thereof, during the pendency of such appeal: *Provided, however*, That the court below may, in its discretion, require as a condition of the appeal an additional bond.

Sec. 130. The Circuit Courts of Appeals shall have the appellate and supervisory jurisdiction conferred upon them by the Act entitled "An Act to establish a uniform system of bankruptcy throughout the United States," approved July first, eighteen hundred and ninety-eight, and all laws amendatory thereof, and shall exercise the same in the manner therein prescribed.

Sec. 131. The Circuit Court of Appeals for the ninth circuit is empowered to hear and determine writs of error and appeals from the United States court for China, as provided in the Act entitled "An Act creating a United States court for China and prescribing the jurisdiction thereof," approved June thirtieth, nineteen hundred and six.

Sec. 132. Any judge of a Circuit Court of Appeals, in respect of cases brought or to be brought before that court, shall have the same powers and duties as to allowances of appeals and writs of error, and the conditions of such allowances, as by law belong to the justices or judges in respect of other courts of the United States, respectively.

Sec. 133. The Circuit Courts of Appeals, in cases in which their judgments and decrees are made final by this title, shall have appellate jurisdiction, by writ of error or appeal, to review the judgments, orders, and decrees of the Supreme Courts of Arizona and New Mexico, as by this title they may have to review the judgments, orders, and decrees of the District Courts; and for that purpose said Territories shall, by orders of the Supreme Court of the United States, to be made from time to time, be assigned to particular circuits.

Sec. 134. In all cases other than those in which a writ of error or appeal will lie direct to the Supreme Court of the United States as provided in section two hundred and forty-seven, in which the amount involved or the value of the subject-matter in controversy shall exceed five hundred dollars, and in all criminal cases, writs of error and appeals shall lie from the District Court for Alaska or from any division thereof, to the Circuit Court of Appeals for the ninth circuit, and the judgments, orders, and decrees of said court shall be final in all such cases. But whenever such Circuit Court of Appeals may desire the instruction of the

Supreme Court of the United States upon any question or proposition of law which shall have arisen in any such case, the court may certify such question or proposition to the Supreme Court, and thereupon the Supreme Court shall give its instruction upon the question or proposition certified to it, and its instructions shall be binding upon the Circuit Court of Appeals.

Sec. 135. All appeals, and writs of error, and other cases, coming from the District Court for the district of Alaska to the Circuit Court of Appeals for the ninth circuit, shall be entered upon the docket and heard at San Francisco, California, or at Portland, Oregon, or at Seattle, Washington, as the trial court before whom the case was tried below shall fix and determine: *Provided*, That at any time before the hearing of any appeal, writ of error, or other case, the parties thereto, through their respective attorneys, may stipulate at which of the above-named places the same shall be heard, in which case the case shall be remitted to and entered upon the docket at the place so stipulated and shall be heard there.

[Chapter seven is omitted. It establishes the Court of Claims and prescribes its jurisdiction and practice.]

[Chapter eight establishes the Court of Customs Appeals, prescribes its jurisdiction and regulates its practice.]

[Chapter nine established the Commerce Court, prescribed its jurisdiction and regulated its practice.]

CHAPTER TEN

THE SUPREME COURT

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| <p>Sec.</p> <p>215. Number of justices.</p> <p>216. Precedence of the associate justices.</p> <p>217. Vacancy in the office of Chief Justice.</p> <p>218. Salaries of justices.</p> <p>219. Clerk, marshal, and reporter.</p> <p>220. The clerk to give bond.</p> <p>221. Deputies of the clerk.</p> <p>222. Records of the old Court of Appeals.</p> <p>223. Tables of fees.</p> <p>224. Marshal of the Supreme Court.</p> <p>225. Duties of the reporter.</p> <p>226. Reporter's salary and allowances.</p> <p>227. Distribution of reports and digests.</p> <p>228. Additional reports and digests; limitation upon cost; estimates to be submitted to Congress annually.</p> <p>229. Distribution of Federal Reporter, etc., and Digests.</p> <p>230. Terms.</p> <p>231. Adjournment for want of a quorum.</p> <p>232. Certain orders made by less than quorum.</p> <p>233. Original disposition.</p> <p>234. Writs of prohibition and mandamus.</p> <p>235. Issues of fact.</p> <p>236. Appellate jurisdiction.</p> <p>237. Writs of error from judgments and decrees of State courts.</p> <p>238. Appeals and writs of error from United States District Courts.</p> <p>239. Circuit Court of Appeals may certify questions to Su-</p> | <p>Sec.</p> <p>preme Court for instructions.</p> <p>240. Certiorari to Circuit Court of Appeals.</p> <p>241. Appeals and writs of error in other cases.</p> <p>242. Appeals from Court of Claims.</p> <p>243. Time and manner of appeals from the Court of Claims.</p> <p>244. Writs of error and appeals from Supreme Court of Porto Rico and United States District Court therefor.</p> <p>245. Writs of error and appeals from the Supreme Courts of Arizona and New Mexico.</p> <p>246. Writs of error and appeals from the Supreme Court of Hawaii.</p> <p>247. Appeals and writs of error from the District Court for Alaska direct to Supreme Court in certain cases.</p> <p>248. Appeals and writs of error from the Supreme Court of the Philippine Islands.</p> <p>249. Appeals and writs of error when a Territory becomes a State.</p> <p>250. Appeals and writs of error from the Court of Appeals of the District of Columbia.</p> <p>251. Certiorari to Court of Appeals, District of Columbia.</p> <p>252. Appellate jurisdiction under the bankruptcy act.</p> <p>253. Precedence of writs of error to State courts.</p> <p>254. Cost of printing records.</p> <p>255. Women may be admitted to practice.</p> |
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Sec. 215. The Supreme Court of the United States shall consist of a Chief Justice of the United States and eight associate justices, any six of whom shall constitute a quorum.

Sec. 216. The associate justices shall have precedence according to the dates of their commissions, or, when the commissions of two or more of them bear the same date, according to their ages.

Sec. 217. In case of a vacancy in the office of Chief Justice, or of his inability to perform the duties and powers of his office, they shall devolve upon the associate justice who is first in precedence, until such disability is removed, or another Chief Justice is appointed and duly qualified. This provision shall apply to every associate justice who succeeds to the office of Chief Justice.

Sec. 218. The Chief Justice of the Supreme Court of the United States shall receive the sum of fifteen thousand dollars a year, and the justices thereof shall receive the sum of fourteen thousand five hundred dollars a year each, to be paid monthly.

Sec. 219. The Supreme Court shall have power to appoint a clerk and a marshal for said court, and a reporter of its decisions.

Sec. 220. The clerk of the Supreme Court shall, before he enters upon the execution of his office, give bond, with sufficient sureties, to be approved by the court, to the United States, in the sum of not less than five thousand and not more than twenty thousand dollars, to be determined and regulated by the Attorney General, faithfully to discharge the duties of his office, and seasonably to record the decrees, judgments, and determinations of the court. The Supreme Court may at any time, upon the motion of the Attorney General, to be made upon thirty days' notice, require a new bond, or a bond for an increased amount within the limits above prescribed; and the failure of the clerk to execute the same shall vacate his office. All bonds given by the clerk shall, after approval, be recorded in his office, and copies thereof from the records, certified by the clerk under seal of the court, shall be competent evidence in any court. The original bonds shall be filed in the Department of Justice.

Sec. 221. One or more deputies of the clerk of the Supreme Court may be appointed by the court on the application of the clerk, and may be removed at the pleasure of the court. In case of the death of the clerk, his deputy or deputies shall, unless removed, continue in office and perform the duties of the clerk in his name until a clerk is appointed and qualified; and for the defaults or misfeasances in office of any such deputy, whether in the lifetime of the clerk or after his death, the clerk, and his estate, and the sureties on his official bond shall be liable; and his executor or administrator shall have such remedy for any such defaults or misfeasances committed after his death as the clerk would be entitled to if the same had occurred in his lifetime.

Sec. 222. The records and proceedings of the Court of Appeals, appointed previous to the adoption of the present Constitution, shall be kept in the office of the clerk of the Supreme Court, who shall give copies thereof to any person requiring and paying for them, in the manner provided by law for giving copies of the records and proceedings of the Supreme Court; and such copies shall have like faith and credit with all other proceedings of said court.

Sec. 223. The Supreme Court is authorized and empowered to prepare the tables of fees to be charged by the clerk thereof.

Sec. 224. The marshal is entitled to receive a salary at the rate of four thousand five hundred dollars a year. He shall attend the court at its sessions; shall serve and execute all process and orders issuing from it, or made by the Chief Justice or an associate justice in pursuance of law; and shall take charge of all property of the United States used by the court or its members. With the approval of the Chief Justice he may appoint assistants and messengers to attend the court, with the compensation allowed to officers of the House of Representatives of similar grade.

Sec. 225. The reporter shall cause the decisions of the Supreme Court to be printed and published within eight months after they are made; and within the same time he shall deliver three hundred copies of the volumes of said reports to the Attorney General. The reporter shall, in any year when he is so directed by the court, cause to be printed

and published a second volume of said decisions, of which he shall deliver a like number of copies in like manner and time.

Sec. 226. The reporter shall be entitled to receive from the Treasury an annual salary of four thousand five hundred dollars when his report of said decisions constitutes one volume, and an additional sum of one thousand two hundred dollars when, by direction of the court, he causes to be printed and published in any year a second volume; and said reporter shall be annually entitled to clerk hire in the sum of one thousand two hundred dollars, and to office rent, stationery, and contingent expenses in the sum of six hundred dollars: *Provided*, That the volumes of the decisions of the court heretofore published shall be furnished by the reporter to the public at a sum not exceeding two dollars per volume, and those hereafter published at a sum not exceeding one dollar and seventy-five cents per volume; and the number of volumes now required to be delivered to the Attorney General shall be furnished by the reporter without any charge therefor. Said salary and compensation, respectively, shall be paid only when he causes such decisions to be printed, published, and delivered within the time and in the manner prescribed by law, and upon the condition that the volumes of said reports shall be sold by him to the public for a price not exceeding one dollar and seventy-five cents a volume.

Sec. 227. The Attorney General shall distribute copies of the Supreme Court reports, as follows: [Here follows a list of persons and officers entitled to receive the reports.]

Sec. 228. [Relates to the volumes to be delivered to the Attorney General.]

Sec. 229. [Relates to the distribution by the Attorney General of reports.]

Sec. 230. The Supreme Court shall hold at the seat of government, one term annually, commencing on the second Monday in October, and such adjourned or special terms as it may find necessary for the dispatch of business.

Sec. 231. If, at any session of the Supreme Court, a quorum does not attend on the day appointed for holding it, the justices who do attend may adjourn the court from day to

day for twenty days after said appointed time, unless there be sooner a quorum. If a quorum does not attend within said twenty days, the business of the court shall be continued over till the next appointed session; and if, during a term, after a quorum has assembled, less than that number attend on any day, the justices attending may adjourn the court from day to day until there is a quorum, or may adjourn without day.

Sec. 232. The justices attending at any term, when less than a quorum is present, may, within the twenty days mentioned in the preceding section, make all necessary orders touching any suit, proceeding, or process, depending in or returned to the court, preparatory to the hearing, trial, or decision thereof.

Sec. 233. The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens, or between a State and citizens of other States, or aliens, in which latter cases it shall have original, but not exclusive, jurisdiction. And it shall have exclusively all such jurisdiction of suits or proceedings against ambassadors or other public ministers, or their domestics or domestic servants, as a court of law can have consistently with the law of nations; and original, but not exclusive, jurisdiction, of all suits brought by ambassadors, or other public ministers, or in which a consul or vice consul is a party.

Sec. 234. The Supreme Court shall have power to issue writs of prohibition to the District Courts, when proceeding as courts of admiralty and maritime jurisdiction; and writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States, or to persons holding office under the authority of the United States, where a State, or an ambassador, or other public minister, or a consul, or vice consul is a party.

Sec. 235. The trial of issues of fact in the Supreme Court, in all actions at law against citizens of the United States, shall be by jury.

Sec. 236. The Supreme Court shall have appellate jurisdiction in the cases hereinafter specially provided for.

Sec. 237. A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity especially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority, may be reëxamined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, at their discretion, award execution or remand the same to the court from which it was removed by the writ.

Sec. 238. Appeals and writs of error may be taken from the District Courts, including the United States District Court for Hawaii, direct to the Supreme Court in the following cases: In any case in which the jurisdiction of the court is in issue, in which case the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision; from the final sentences and decrees in prize causes; in any case that involves the construction or application of the Constitution of the United States; in any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority is drawn in question; and in any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States.

Sec. 239. In any case within its appellate jurisdiction, as defined in section one hundred and twenty-eight, the Circuit

Court of Appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision; and thereupon the Supreme Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the Circuit Court of Appeals in such case, or it may require that the whole record and cause be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal.

Sec. 240. In any case, civil or criminal, in which the judgment or decree of the Circuit Court of Appeals is made final by the provisions of this Title, it shall be competent for the Supreme Court to require, by certiorari or otherwise, upon the petition of any party thereto, any such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court.

Sec. 241. In any case in which the judgment or decree of the Circuit Court of Appeals is not made final by the provisions of this Title, there shall be of right an appeal or writ of error to the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars, besides costs.

Sec. 242. An appeal to the Supreme Court shall be allowed on behalf of the United States, from all judgments of the Court of Claims adverse to the United States, and on behalf of the plaintiff in any case where the amount in controversy exceeds three thousand dollars, or where his claim is forfeited to the United States by the judgment of said court as provided in section one hundred and seventy-two.

Sec. 243. All appeals from the Court of Claims shall be taken within ninety days after the judgment is rendered, and shall be allowed under such regulations as the Supreme Court may direct.

Sec. 244. Writs of error and appeals from the final judgments and decrees of the Supreme Court of, and the United States District Court for, Porto Rico, may be taken and

prosecuted to the Supreme Court of the United States, in any case wherein is involved the validity of any copyright, or in which is drawn in question the validity of a treaty or statute of, or authority exercised under, the United States, or wherein the Constitution of the United States, or a treaty thereof, or an Act of Congress is brought in question and the right claimed thereunder is denied, without regard to the sum or value of the matter in dispute; and in all other cases in which the sum or value of the matter in dispute, exclusive of costs, to be ascertained by the oath of either party or of other competent witnesses, exceeds the sum or value of five thousand dollars. Such writs of error and appeals shall be taken within the same time, in the same manner, and under the same regulations as writs of error and appeals are taken to the Supreme Court of the United States from the District Courts.

Sec. 245. Writs of error and appeals from the final judgments and decrees of the Supreme Courts of the Territories of Arizona and New Mexico may be taken and prosecuted to the Supreme Court of the United States in any case wherein is involved the validity of any copyright, or in which is drawn in question the validity of a treaty or statute of, or authority exercised under, the United States, without regard to the sum or value of the matter in dispute; and in all other cases in which the sum or value of the matter in dispute, exclusive of costs, to be ascertained by the oath of either party or of other competent witnesses, exceeds the sum or value of five thousand dollars.

Sec. 246. Writs of error and appeals from the final judgments and decrees of the Supreme Court of the Territory of Hawaii may be taken and prosecuted to the Supreme Court of the United States, within the same time, in the same manner, under the same regulations, and in the same classes of cases, in which writs of error and appeals from the final judgments and decrees of the highest court of a State in which a decision in the suit could be had, may be taken and prosecuted to the Supreme Court of the United States under the provisions of section two hundred and thirty-seven; and also in all cases wherein the amount involved, exclusive of

costs, to be ascertained by the oath of either party or of other competent witnesses, exceeds the sum or value of five thousand dollars.

Sec. 247. Appeals and writs of error may be taken and prosecuted from final judgments and decrees of the District Court for the district of Alaska or for any division thereof, direct to the Supreme Court of the United States, in the following cases: In prize cases; and in all cases which involve the construction or application of the Constitution of the United States, or in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority is drawn in question, or in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States. Such writs of error and appeal shall be taken within the same time, in the same manner, and under the same regulations as writs of error and appeals are taken from the District Courts to the Supreme Court.

Sec. 248. The Supreme Court of the United States shall have jurisdiction to review, revise, reverse, modify, or affirm the final judgments and decrees of the Supreme Court of the Philippine Islands in all actions, cases, causes, and proceedings now pending therein or hereafter determined thereby, in which the Constitution, or any statute, treaty, title, right, or privilege of the United States is involved, or in causes in which the value in controversy exceeds twenty-five thousand dollars, or in which the title or possession of real estate exceeding in value the sum of twenty-five thousand dollars, to be ascertained by the oath of either party or of other competent witnesses, is involved or brought in question; and such final judgments or decrees may and can be reviewed, revised, reversed, modified, or affirmed by said Supreme Court on appeal or writ of error by the party aggrieved, within the same time, in the same manner, under the same regulations, and by the same procedure, as far as applicable, as the final judgments and decrees of the District Courts of the United States.

Sec. 249. In all cases where the judgment or decree of any court of a Territory might be reviewed by the Supreme Court

on writ of error or appeal, such writ of error or appeal may be taken, within the time and in the manner provided by law, notwithstanding such Territory has, after such judgment or decree, been admitted as a State; and the Supreme Court shall direct the mandate to such court as the nature of the writ of error or appeal requires.

Sec. 250. Any final judgment or decree of the court of Appeals of the District of Columbia may be reëxamined and affirmed, reversed, or modified by the Supreme Court of the United States, upon writ of error or appeal, in the following cases:

First. In cases in which the jurisdiction of the trial court is in issue; but when any such case is not otherwise reviewable in said Supreme Court, then the question of jurisdiction alone shall be certified to said Supreme Court for decision.

Second. In prize cases.

Third. In cases involving the construction or application of the Constitution of the United States, or the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority.

Fourth. In cases in which the constitution, or any law of a State, is claimed to be in contravention of the Constitution of the United States.

Fifth. In cases in which the validity of any authority exercised under the United States, or the existence or scope of any power or duty of an officer of the United States is drawn in question.

Sixth. In cases in which the construction of any law of the United States is drawn in question by the defendant.

Except as provided in the next succeeding section, the judgments and decrees of said Court of Appeals shall be final in all cases arising under the patent laws, the copyright laws, the revenue laws, the criminal laws, and in admiralty cases; and, except as provided in the next succeeding section, the judgments and decrees of said Court of Appeals shall be final in all cases not reviewable as hereinbefore provided.

Writs of error and appeals shall be taken within the same time, in the same manner, and under the same regulations as

writs of error and appeals are taken from the Circuit Courts of Appeals to the Supreme Court of the United States.

Sec. 251. In any case in which the judgment or decree of said Court of Appeals is made final by the section last preceding, it shall be competent for the Supreme Court of the United States to require, by certiorari or otherwise, any such case to be certified to it for its review and determination, with the same power and authority in the case as if it had been carried by writ of error or appeal to said Supreme Court. It shall also be competent for said Court of Appeals, in any case in which its judgment or decree is made final under the section last preceding, at any time to certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for their proper decision; and thereupon the Supreme Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon said Court of Appeals in such case, or it may require that the whole record and cause be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal.

Sec. 252. The Supreme Court of the United States is hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings, from the courts of bankruptcy, from which it has appellate jurisdiction in other cases; and shall exercise a like jurisdiction from courts of bankruptcy not within any organized circuit of the United States and from the Supreme Court of the District of Columbia.

An appeal may be taken to the Supreme Court of the United States from any final decision of a Court of Appeals allowing or rejecting a claim under the laws relating to bankruptcy, under such rules and within such time as may be prescribed by said Supreme Court, in the following cases and no other:

First. Where the amount in controversy exceeds the sum of two thousand dollars, and the question involved is one which might have been taken on appeal or writ of error from the

highest court of a State to the Supreme Court of the United States; or

Second. Where some justice of the Supreme Court shall certify that in his opinion the determination of the question involved in the allowance or rejection of such claim is essential to a uniform construction of the laws relating to bankruptcy throughout the United States.

Controversies may be certified to the Supreme Court of the United States from other courts of the United States, and the former court may exercise jurisdiction thereof, and may issue writs of certiorari pursuant to the provisions of the United States laws now in force or such as may be hereafter enacted.

Sec. 253. Cases on writ of error to revise the judgment of a State court in any criminal case shall have precedence on the docket of the Supreme Court, of all cases to which the Government of the United States is not a party, excepting only such cases as the court, in its discretion, may decide to be of public importance.

Sec. 254. There shall be taxed against the losing party in each and every cause pending in the Supreme Court the cost of printing the record in such case, except when the judgment is against the United States.

Sec. 255. Any woman who shall have been a member of the bar of the highest court of any State or Territory, or of the Court of Appeals of the District of Columbia, for the space of three years, and shall have maintained a good standing before such court, and who shall be a person of good moral character, shall, on motion, and the production of such record, be admitted to practice before the Supreme Court of the United States.

CHAPTER ELEVEN

PROVISIONS COMMON TO MORE THAN ONE COURT

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| <p>Sec.</p> <p>256. Cases in which jurisdiction of United States courts shall be exclusive of State courts.</p> <p>257. Oath of United States judges.</p> <p>258. Judges prohibited from practicing law.</p> <p>259. Traveling expenses, etc., of circuit justices and circuit and district judges.</p> <p>260. Salary of judges after resignation.</p> <p>261. Writs of ne exeat.</p> <p>262. Power to issue writs.</p> <p>263. Temporary restraining orders.</p> <p>264. Injunctions; in what cases judge may grant.</p> <p>265. Injunctions to stay proceedings in State courts.</p> <p>266. Injunctions based upon al-</p> | <p>Sec.</p> <p>leged unconstitutionality of State statutes; when and by whom may be granted.</p> <p>267. When suits in equity may be maintained.</p> <p>268. Power to administer oaths and punish contempts.</p> <p>269. New trials.</p> <p>270. Power to hold to security for the peace and good behavior.</p> <p>271. Power to enforce awards of foreign consuls, etc., in certain cases.</p> <p>272. Parties may manage their causes personally or by counsel.</p> <p>273. Certain officers forbidden to act as attorneys.</p> <p>274. Penalty for violating preceding section.</p> |
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Sec. 256. The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several States:

First. Of all crimes and offenses cognizable under the authority of the United States.

Second. Of all suits for penalties and forfeitures incurred under the laws of the United States.

Third. Of all civil causes of admiralty and maritime jurisdiction; saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it.

Fourth. Of all seizures under the laws of the United States, on land or on waters not within admiralty and maritime jurisdiction; of all prizes brought into the United States; and of all proceedings for the condemnation of property taken as prize.

Fifth. Of all cases arising under the patent-right, or copy-right laws of the United States.

Sixth. Of all matters and proceedings in bankruptcy.

Seventh. Of all controversies of a civil nature, where a State is a party, except between a State and its citizens, or between a State and citizens of other States, or aliens.

Eighth. Of all suits and proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, or against consuls or vice-consuls.

Sec. 257. The justices of the Supreme Court, the circuit judges, and the district judges, hereafter appointed, shall take the following oath before they proceed to perform the duties of their respective offices: "I, ———, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as ——— according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States: So help me God."

Sec. 258. It shall not be lawful for any judge appointed under the authority of the United States to exercise the profession or employment of counsel or attorney, or to be engaged in the practice of the law. Any person offending against the prohibition of this section shall be deemed guilty of a high misdemeanor.

Sec. 259. The circuit justices, the circuit and district judges of the United States, and the judges of the District Courts of the United States in Alaska, Hawaii, and Porto Rico, shall each be allowed and paid his necessary expenses of travel, and his reasonable expenses (not to exceed ten dollars per day) actually incurred for maintenance, consequent upon his attending court or transacting other official business in pursuance of law at any place other than his official place of residence, said expenses to be paid by the marshal of the district in which such court is held or official business transacted, upon the written certificate of the justice or judge. The official place of residence of each justice and of each circuit judge while assigned to the Commerce Court shall be

at Washington; and the official place of residence of each circuit and district judge, and of each judge of the District Courts of the United States in Alaska, Hawaii, and Porto Rico, shall be at that place nearest his actual residence at which either a Circuit Court of Appeals or a District Court is regularly held. Every such judge shall, upon his appointment, and from time to time thereafter whenever he may change his official residence, in writing notify the Department of Justice of his official place of residence.

Sec. 260. When any judge of any court of the United States appointed to hold his office during good behavior resigns his office, after having held a commission or commissions as judge of any such court or courts at least ten years continuously, and having attained the age of seventy years, he shall, during the residue of his natural life, receive the salary which is payable at the time of his retirement for the office that he held at the time of his resignation.

Sec. 261. Writs of ne exeat may be granted by any justice of the Supreme Court, in cases where they might be granted by the Supreme Court; and by any district judge, in cases where they might be granted by the District Court of which he is a judge. But no writ of ne exeat shall be granted unless a suit in equity is commenced, and satisfactory proof is made to the court or judge granting the same that the defendant designs quickly to depart from the United States.

Sec. 262. The Supreme Court and the District Courts shall have power to issue writs of scire facias. The Supreme Court, the Circuit Courts of Appeals, and the District Courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.

Sec. 263. Whenever notice is given of a motion for an injunction out of a District Court, the court or judge thereof may, if there appears to be danger of irreparable injury from delay, grant an order restraining the act sought to be enjoined until the decision upon the motion; and such order may be granted with or without security, in the discretion of the court or judge.

Repealed
10/5/14

Sec. 264. Writs of injunction may be granted by any justice of the Supreme Court in cases where they might be granted by the Supreme Court; and by any judge of a District Court in cases where they might be granted by such court. But no justice of the Supreme Court shall hear or allow any application for an injunction or restraining order in any cause pending in the circuit to which he is allotted, elsewhere than within such circuit, or at such place outside of the same as the parties may stipulate in writing, except when it cannot be heard by the district judge of the district. In case of the absence from the district of the district judge, or of his disability, any circuit judge of the circuit in which the district is situated may grant an injunction or restraining order in any case pending in the District Court, where the same might be granted by the district judge.

Sec. 265. The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy.

Sec. 266. No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such State, shall be issued or granted by any justice of the Supreme Court, or by any District Court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court, or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. Whenever such application as aforesaid is presented to a justice of the Supreme Court, or to a judge, he shall imme-

diately call to his assistance to hear and determine the application two other judges: *Provided, however,* That one of such three judges shall be a justice of the Supreme Court, or a circuit judge. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the governor and to the attorney general of the State, and to such other persons as may be defendants in the suit: *Provided,* That if of opinion that irreparable loss or damage would result to the complainant unless a temporary restraining order is granted, any justice of the Supreme Court, or any circuit or district judge, may grant such temporary restraining order at any time before such hearing and determination of the application for an interlocutory injunction, but such temporary restraining order shall remain in force only until the hearing and determination of the application for an interlocutory injunction upon notice as aforesaid. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case. It is further provided, that if before the final hearing of such application, a suit shall have been brought in a court of the State having jurisdiction thereof, under the laws of such State, to enforce such statute or order, accompanied by a stay in such State court, of proceedings under such statute, or order, pending the determination of such suit by such State court, all proceedings in any court of the United States to restrain the execution of such statute or order, shall be stayed pending the final determination of such suit in the courts of the State. Such stay may be vacated upon proof made after hearing and notice of ten days served upon the Attorney General of the State, that the suit in the State courts is not being prosecuted with diligence and good faith. (*As amended by the Act of March 3rd, 1913. 37 Stat. L.*)

Sec. 267. Suits in equity shall not be sustained in any court

of the United States in any case where a plain, adequate, and complete remedy may be had at law.

Sec. 268. The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority: *Provided*, That such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts.

Sec. 269. All of the said courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law.

Sec. 270. The judges of the Supreme Court and of the Circuit Courts of Appeals and District Courts, United States commissioners, and the judges and other magistrates of the several States, who are or may be authorized by law to make arrests for offenses against the United States, shall have the like authority to hold to security of the peace and for good behavior, in cases arising under the Constitution and laws of the United States, as may be lawfully exercised by any judge or justice of the peace of the respective States, in cases cognizable before them.

Sec. 271. The District Courts and the United States commissioners shall have power to carry into effect, according to the true intent and meaning thereof, the award or arbitration or decree of any consul, vice consul, or commercial agent of any foreign nation, made or rendered by virtue of authority conferred on him as such consul, vice consul, or commercial agent, to sit as judge or arbitrator in such differences as may arise between the captains and crews of the vessels belonging to the nation whose interests are committed to his charge, application for the exercise of such power being first made to such court or commissioner, by

petition of such consul, vice consul, or commercial agent. And said courts and commissioners may issue all proper remedial process, mesne and final, to carry into full effect such award, arbitration, or decree, and to enforce obedience thereto by imprisonment in the jail or other place of confinement in the district in which the United States may lawfully imprison any person arrested under the authority of the United States, until such award, arbitration, or decree is complied with, or the parties are otherwise discharged therefrom, by the consent in writing of such consul, vice consul, or commercial agent, or his successor in office, or by the authority of the foreign government appointing such consul, vice consul, or commercial agent: *Provided, however,* That the expenses of the said imprisonment and maintenance of the prisoners, and the cost of the proceedings, shall be borne by such foreign government, or by its consul, vice consul, or commercial agent requiring such imprisonment. The marshals of the United States shall serve all such process, and do all other acts necessary and proper to carry into effect the premises, under the authority of the said courts and commissioners.

Sec. 272. In all the courts of the United States the parties may plead and manage their own causes personally, or by the assistance of such counsel or attorneys at law as, by the rules of the said courts, respectively, are permitted to manage and conduct causes therein.

Sec. 273. No clerk, or assistant or deputy clerk, of any Territorial, district, or Circuit Court of Appeals, or of the Court of Claims, or of the Supreme Court of the United States, or marshal or deputy marshal of the United States within the district for which he is appointed, shall act as a solicitor, proctor, attorney, or counsel in any cause depending in any of said courts, or in any district for which he is acting as such officer.

Sec. 274. Whoever shall violate the provisions of the preceding section shall be stricken from the roll of attorneys by the court upon complaint, upon which the respondent shall have due notice and be heard in his defense; and in the case

of a marshal or deputy marshal so acting, he shall be recommended by the court for dismissal from office.

[Chapter twelve relates to Juries.]

CHAPTER THIRTEEN

GENERAL PROVISIONS

Sec.	Sec.
289. Circuit Courts abolished; records of to be transferred to District Courts.	293. Sections 1 to 5, Revised Statutes, to govern construction of this act.
290. Suits pending in Circuit Courts to be disposed of in District Courts.	294. Laws revised in this act to be construed as continuations of existing laws.
291. Powers and duties of Circuit Courts imposed upon District Courts.	295. Inference of legislative construction not to be drawn by reason of arrangement of sections.
292. References to laws revised in this act deemed to refer to sections of act.	296. Act may be designated as "The Judicial Code."

Sec. 289. The Circuit Courts of the United States, upon the taking effect of this Act, shall be, and hereby are, abolished; and thereupon, on said date, the clerks of said courts shall deliver to the clerks of the District Courts of the United States for their respective districts all the journals, dockets, books, files, records, and other books and papers of or belonging to or in any manner connected with said Circuit Courts; and shall also on said date deliver to the clerks of said District Courts all moneys, from whatever source received, then remaining in their hands or under their control as clerks of said Circuit Courts, or received by them by virtue of their said offices. The journals, dockets, books, files, records, and other books and papers so delivered to the clerks of the several District Courts shall be and remain a part of the official records of said District Courts, and copies thereof, when certified under the hand and seal of the clerk of the district Court, shall be received as evidence equally with the originals thereof; and the clerks of the several District Courts shall have the same authority to exercise all the powers and to perform all the duties with respect thereto as the clerks of the

several Circuit Courts had prior to the taking effect of this Act.

Sec. 290. All suits and proceedings pending in said Circuit Courts on the date of the taking effect of this Act, whether originally brought therein or certified thereto from the District Courts, shall thereupon and thereafter be proceeded with and disposed of in the District Courts in the same manner and with the same effect as if originally begun therein, the record thereof being entered in the records of the Circuit Courts so transferred as above provided.

Sec. 291. Wherever, in any law not embraced within this Act, any reference is made to, or any power or duty is conferred or imposed upon, the Circuit Courts, such reference shall, upon the taking effect of this Act, be deemed and held to refer to, and to confer such power and impose such duty upon, the District Courts.

Sec. 292. Wherever, in any law not contained within this Act, a reference is made to any law revised or embraced herein, such reference, upon the taking effect hereof, shall be construed to refer to the section of this Act into which has been carried or revised the provision of law to which reference is so made.

Sec. 293. The provisions of sections one to five, both inclusive, of the Revised Statutes, shall apply to and govern the construction of the provisions of this Act. The words "this title," wherever they occur herein, shall be construed to mean this Act.

Sec. 294. The provisions of this Act, so far as they are substantially the same as existing statutes, shall be construed as continuations thereof, and not as new enactments, and there shall be no implication of a change of intent by reason of a change of words in such statute, unless such change of intent shall be clearly manifest.

Sec. 295. The arrangement and classification of the several sections of this Act have been made for the purpose of a more convenient and orderly arrangement of the same, and therefore no inference or presumption of a legislative construction is to be drawn by reason of the chapter under which any particular section is placed.

Sec. 296. This Act may be designated and cited as "The Judicial Code."

CHAPTER FOURTEEN

REPEALING PROVISIONS

Sec.	Sec.
297. Sections, acts, and parts of acts repealed.	300. Offenses committed, and penalties, forfeitures, and liabilities incurred, how to be prosecuted and enforced.
298. Repeal not to affect tenure of office, or salary, or compensation of incumbents, etc.	301. Date this act shall be effective.
299. Accrued rights, etc., not affected.	

Sec. 297. The following sections of the Revised Statutes and Acts and parts of Acts are hereby repealed:

Sections five hundred and thirty to five hundred and sixty, both inclusive; sections five hundred and sixty-two to five hundred and sixty-four, both inclusive; sections five hundred and sixty-seven to six hundred and twenty-seven, both inclusive; sections six hundred and twenty-nine to six hundred and forty-seven, both inclusive; sections six hundred and fifty to six hundred and ninety-seven, both inclusive; section six hundred and ninety-nine; sections seven hundred and two to seven hundred and fourteen, both inclusive; sections seven hundred and sixteen to seven hundred and twenty, both inclusive; section seven hundred and twenty-three; sections seven hundred and twenty-five to seven hundred and forty-nine, both inclusive; sections eight hundred to eight hundred and twenty-two, both inclusive; sections ten hundred and forty-nine to ten hundred and eighty-eight, both inclusive; sections ten hundred and ninety-one to ten hundred and ninety-three, both inclusive, of the Revised Statutes.

"An Act to determine the jurisdiction of Circuit Courts of the United States and to regulate the removal of causes from State courts, and for other purposes," approved March third, eighteen hundred and seventy-five.

Section five of an Act entitled "An Act to amend section

fifty-three hundred and fifty-two of the Revised Statutes of the United States, in reference to bigamy, and for other purposes," approved March twenty-second, eighteen hundred and eighty-two; but sections six, seven, and eight of said Act, and sections one, two, and twenty-six of an Act entitled "An Act to amend an Act entitled 'An Act to amend section fifty-three hundred and fifty-two of the Revised Statutes of the United States, in reference to bigamy, and for other purposes,' approved March twenty-second, eighteen hundred and eighty-two," approved March third, eighteen hundred and eighty-seven, are hereby continued in force.

"An Act to afford assistance and relief to Congress and the executive departments in the investigation of claims and demands against the Government," approved March third, eighteen hundred and eighty-three.

"An Act regulating appeals from the Supreme Court of the District of Columbia and the Supreme Courts of the several Territories," approved March third, eighteen hundred and eighty-five.

"An Act to provide for the bringing of suits against the Government of the United States," approved March third, eighteen hundred and eighty-seven, except sections four, five, six, seven, and ten thereof.

Sections one, two, three, four, six, and seven of an Act entitled "An Act to correct the enrollment of an Act approved March third, eighteen hundred and eighty-seven, entitled 'An Act to amend sections one, two, three, and ten of an Act to determine the jurisdiction of the Circuit Courts of the United States, and to regulate the removal of causes from State courts, and for other purposes,' approved March third, eighteen hundred and seventy-five," approved August thirteenth, eighteen hundred and eighty-eight.

"An Act to withdraw from the Supreme Court jurisdiction of criminal cases not capital and confer the same on the Circuit Courts of Appeals," approved January twentieth, eighteen hundred and ninety-seven.

"An Act to amend sections one and two of the Act of March third, eighteen hundred and eighty-seven, Twenty-fourth Statutes at Large, chapter three hundred and fifty-

nine," approved June twenty-seventh, eighteen hundred and ninety-eight.

"An Act to amend the seventh section of the Act entitled 'An Act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes,' approved March third, eighteen hundred and ninety-one, and the several Acts amendatory thereto," approved April fourteenth, nineteen hundred and six.

All Acts and parts of Acts authorizing the appointment of United States circuit or district judges, or creating or changing judicial circuits, or judicial districts or divisions thereof, or fixing or changing the times or places of holding court therein, enacted prior to February first, nineteen hundred and eleven.

Sections one, two, three, four, five, the first paragraph of section six, and section seventeen of an Act entitled "An Act to create a commerce court, and to amend an Act entitled 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, as heretofore amended, and for other purposes," approved June eighteenth, nineteen hundred and ten.

Also all other Acts and parts of Acts, in so far as they are embraced within and superseded by this Act, are hereby repealed; the remaining portions thereof to be and remain in force with the same effect and to the same extent as if this Act had not been passed.

Sec. 298. The repeal of existing laws providing for the appointment of judges and other officers mentioned in this Act, or affecting the organization of the courts, shall not be construed to affect the tenure of office of the incumbents (except the office be abolished), but they shall continue to hold their respective offices during the terms for which appointed, unless removed as provided by law; nor (except the office be abolished) shall such repeal affect the salary or fees or compensation of any officer or person holding office or position by virtue of any law.

Sec. 299. The repeal of existing laws, or the amendments thereof, embraced in this Act, shall not affect any act done,

or any right accruing or accrued, or any suit or proceeding, including those pending on writ of error, appeal, certificate, or writ of certiorari, in any appellate court referred to or included within, the provisions of this Act, pending at the time of the taking effect of this Act, but all such suits and proceedings, and suits and proceedings for causes arising or acts done prior to such date, may be commenced and prosecuted within the same time, and with the same effect, as if said repeal or amendments had not been made.

Sec. 300. All offenses committed, and all penalties, forfeitures, or liabilities incurred prior to the taking effect hereof, under any law embraced in, amended, or repealed by this Act, may be prosecuted and punished, or sued for and recovered, in the District Courts, in the same manner and with the same effect as if this Act had not been passed.

Sec. 301. This Act shall take effect and be in force on and after January first, nineteen hundred and twelve.

Approved, March 3, 1911, ch. 231, 36 *Stat. at L.* ch. 231, *U. S. Comp. Stat. Sup.* 1911, p. 128.

FORMS

Restraining Order Pending Application for Injunction

In the United States District Court in and for the _____ District of _____, _____ Term, 19—.

v.

Whereas, in the above cause a motion for the issuance of a preliminary writ of injunction has been duly filed, the hearing thereof being fixed for the _____ day of _____, 19—, and it having been made to appear that there is danger of irreparable injury being caused to complainant before the hearing of said application for the writ of injunction, unless the said defendants are, pending such hearing, restrained as herein set forth, therefore complainant's application for such restraining order is granted (*if security is required, then add upon his giving good security in the sum of _____, for making good to the defendants the damages and costs that may be awarded them by reason of the granting of this order*):

Now, therefore, take notice that you, _____ and _____, defendants herein, your agents, servants, and attorneys, and each of you, are hereby specially restrained and enjoined from (*here insert the act or acts sought to be restrained*) until the hearing upon said application for a writ of injunction and the further order of the court in the premises.

_____,
Judge.

Order Granting Preliminary Injunction ¹

In the United States District Court in and for the _____ District of _____, _____ Term, 19—.

v.

Whereas, in the above entitled cause, an application for the issuance of a preliminary writ of injunction was duly filed and set down for hearing before the court (*or, before the Honorable _____, a judge of said court*), on the _____ day of _____, 19—, at _____,

¹ See Sec. 266, Judicial Code, *ante*, p. 817.

notice of such application being given to _____ and _____, defendants herein; and the parties now appearing by their solicitors and being heard upon such application, and it appearing that cause exists for the granting of a writ of injunction, pending the final hearing of the cause, as prayed for:

It is therefore ordered that upon the complainant giving security, by bond, in the sum of _____, conditioned that (*here insert the proper conditions*) a writ of injunction issue commanding, restraining, and enjoining the defendants, their agents, servants, and attorneys, from (*here set forth the special matter sought to be enjoined*) until the further order of the court in the premises. Done and ordered this _____ day of _____, A. D.

_____,
Judge.

Writ of Preliminary Injunction

In the United States District Court in and for the _____ District of _____, _____ Term, 19—.

v.

The President of the United States, To _____ and _____

Whereas, in the above entitled cause, now pending in said District Court of the United States in and for the _____ district of _____, upon application duly made to the court (*or if to a Justice of the Supreme Court or a Circuit or District judge, so state, giving his name*) it was on the _____ day of _____, 19—, ordered that a preliminary writ of injunction issue therein as prayed for in the bill of complaint herein filed and as directed in said order:

Now, therefore, know ye, that you, _____ and _____, your agents, servants, and attorneys, and each of you, are hereby strictly restrained and enjoined from (*here set forth clearly the act or acts sought to be restrained*) and you and each of you are hereby commanded that you do desist and refrain from doing or causing to be done all or any of the acts and things hereinabove recited and set forth, until the further order of the court in the premises.

Witness, the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States, and the seal of said District Court this _____ day of _____ A. D. 19—.

_____, Clerk.

NOTE. No interlocutory injunction restraining the enforcement of any statute of a State through its officers may be granted upon the ground of the unconstitutionality of such statute unless heard by three judges of whom one must be a justice of the Supreme Court or a Circuit judge. Section 266, Judicial Code, *ante*, page 817.

Form of Petition for Removal from a State Court Where the Adverse Parties are all Citizens of Different States Under Section 28, Judicial Code

IN THE _____ COURT OF _____ COUNTY, STATE OF _____.

_____ plaintiffs,	}	Petition for Removal.
v.		
_____ defendants,		

To said _____ Court.

Your petitioner, _____, respectfully shows to this honorable court that the amount in dispute in the above entitled suit exceeds, exclusive of costs, the sum or value of three thousand dollars; that the controversy in said suit is between citizens of different States; that each adverse party is a citizen of different States; that your petitioner was at the time of the commencement of this suit, and still is a citizen of the State of _____, and that _____ then was, and still is, a citizen of the State of _____, and that _____ then was, and still is, a citizen of the State of _____, (and so state the citizenship of other parties) and that this application is within the time prescribed by law.

Your petitioner offers herewith a bond with good and sufficient surety for his entering in said District Court of the United States, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said District Court, if said court shall hold that this suit was wrongfully or improperly removed thereto. And he prays this court to proceed no further herein, except to make the order of removal required by law, and to accept the said surety and bond, and to cause the record herein to be removed into said District Court of the United States in and for the district of _____.

_____,
by

_____, his attorney.

It may be verified in the following form;

STATE OF _____,
COUNTY OF _____.

I, _____ being duly sworn, do say that I am one of the defendants in the above entitled cause; that I have read the foregoing petition and know the contents thereof; and that the statements therein contained are true, as I verily believe.

Subscribed by the said _____ in my presence, and by him sworn to before me, this the _____ day of _____, A. D. 19-.

_____,
Notary Public for _____.

My Commission expires _____.

Bond for the Removal of a Cause under Section 29, Judicial Code

[Title of cause.]

Know all men by these presents, that I, _____, as principal, and _____, as surety, are held and firmly bound unto _____ in the penal sum of _____ dollars, the payment whereof well and truly to be made unto the said _____, heirs and assigns, we bind ourselves, our heirs, and representatives jointly and severally, firmly by these presents.

The condition of this bond is that the said _____, having petitioned the _____ Court of _____ county, State of _____, for the removal of a certain cause pending therein, wherein _____ is plaintiff and _____, defendant, to the District Court of the United States in and for the _____ district of _____.

Now, if the said _____, shall enter in said District Court of the United States, within 30 days' from the date of the petition filed herein, a certified copy of the record in said suit, and shall well and truly pay all costs that may be awarded by the said District Court of the United States, if said court shall hold that said suit was wrongfully or improperly removed thereto (if special bail was originally requisite in said cause, then add, "and shall then and there appear and enter special bail in said suit"), then this obligation to be void; otherwise in full force and virtue.

Witness our hands and seals, this _____ day of _____, A. D. 19-.

_____ [L. S.]

_____ [L. S.]

It is advisable that the sureties justify, but not absolutely necessary.

NOTE: By section 29, Judicial Code, written notice of the petition and bond for removal must be given the adverse party prior to filing the same.

Order of State Court for the Removal of Cause

At a _____ term of the _____ Court for the State of _____, held in the city of _____ on the _____ day of _____, A. D. 19-.

Present: Honorable _____, Judge.

v.

On the pleadings and proceedings herein, and on the petition and bond filed herein by the defendant under the statutes of the United States,

and on motion of _____, defendant's attorney, it is ordered that the security offered by the defendant be accepted and said bond approved, and that the State court proceed no further in this cause, and that this cause be removed into the United States District Court in and for the _____ district of _____.

_____, Clerk.

Notice of the Removal of a Cause

CIRCUIT COURT OF UNITED STATES _____ FOR THE _____ DISTRICT OF _____.

v.

To _____, attorney for the plaintiff:

Please take notice that on the _____ day of _____, 19____, by an order of the _____ Court of the State of _____, the above entitled cause was transferred to the District Court of the United States for the _____ district of _____.

_____, defendant's attorney.

[DATE.]

NOTE: The provision of Sec. 29, Judicial Code, that the party removing a cause into the Federal courts shall within thirty days plead answer or demur to the declaration or complaint does not prohibit a plea to the jurisdiction over the defendant obtained in the State court because process was not served on the defendant, since by Section 38, Judicial Code, all suits removed proceed in the Federal court as if the suit had been originally commenced in that court.

Cain v. Commercial Publishing Co., 232 U.S. 124, decided January 19, 1914.

Although by the statutes of the State or the rules of the court all appearances are required to be general, the conformity act (*Revised Statutes*, Sec. 914, *U. S. Comp. Stats.* 1901, L. 684), does not prevent the defendant upon filing a petition for removal from entering in the Federal court a special appearance, and filing a plea to the jurisdiction over his person claimed to have been acquired by an alleged service of process from the State court before the cause was removed. *Ib.*

Form of Writ of Certiorari Under Sec. 39 of the Act of Mar. 3, 1911

The President of the United States of America to the judge of the Court of (here describe the court).

Whereas it has been represented to the District Court of the United States for the district of _____ that a certain suit was commenced

in the _____ Court of (here name the State court), wherein _____, a citizen of the State of _____, is plaintiff, and the said _____ a citizen of the State of _____, is defendant; and that the said _____ duly filed in the said State court his petition for the removal of said cause into the said District Court of the United States, and filed with said petition the bond with surety required by the Act of Congress of Mar. 3, 1911, entitled, "An Act to codify and revise the laws relating to the judiciary," and that the clerk of the said State court above named has refused to the said petitioner for the removal of said cause a copy of the record therein, though his legal fees therefor have been tendered by the said petitioner:

You, therefore, are hereby commanded that you forthwith certify, or cause to be certified to the District Court of the United States for the _____ district of _____, a full, true and complete copy of the record and proceedings in the said cause, in which the said petition for removal was filed as aforesaid, plainly and distinctly, and in as full and ample a manner as the same now remain before you, together with this writ; so that the said District Court may be able to proceed therein and do what to them shall appear of right ought to be done. Herein fail not.

Witness, the Honorable Edward Douglass White, Chief Justice of the Supreme Court, and the seal of the said District Court hereto affixed, this the _____ day of _____, A. D. 19—.

_____, Clerk of said Circuit Court.

Instructions as to Applications for Writs of Certiorari under Sec. 240 of the Judicial Code

The following are the requirements of the Supreme Court on applications for writs of certiorari under Sec. 240 of the Judicial Code.

Petitions are docketed in the Supreme Court as _____, Petitioner, v. _____, Respondent.

Before the petition will be docketed there must be furnished the Clerk:

1. An original petition containing a short statement of the matter involved, and the general reasons relied on for allowance of the writ, with written signature of counsel.

2. A certified copy of the transcript of the record, including all proceedings in the Circuit Court of Appeals.

3. An appearance of counsel for petitioner, signed by a member of the bar of the Supreme Court.

4. A deposit of \$25 on account of costs.

Before submission of the petition there must be furnished:

1. Proof of service of notice of date fixed for submission and of copies of petition, and of brief upon counsel for the respondent. Two weeks' notice should be given. (See Supreme Court Rule 37, *ante*, page 188.)

2. Thirty printed copies of the petition.

3. Thirty printed copies of brief in support of petition, if any such brief is to be filed.

4. At least nine uncertified copies of the record, which must contain all the proceedings in the Circuit Court of Appeals. These copies may be made up by using copies of the record as printed for the Circuit Court of Appeals and adding thereto printed copies of the proceedings in that court. If a sufficient number of records thus made up cannot be obtained, making it necessary to reprint the record for use on the hearing of the petition, fifty copies must be printed under supervision of the Clerk of the Supreme Court in order that, should the petition be granted, there may be a sufficient number for use on the final hearing.

Monday being motion day, some Monday must be fixed upon for the submission of the petition. No oral argument is permitted on such petitions, but they must be called up and submitted in open court by counsel for petitioner, or by some attorney in his behalf.

All papers in the case must be filed not later than the Saturday preceding the Monday fixed for the submission of the petition.

Writ of Error from the Supreme Court to a Federal Court

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Judge of the District Court of the United States for the _____ district of _____ (or to the Judges of the Circuit Court of Appeals for the _____ circuit),
Greeting:

BECAUSE, in the record and the proceedings, as also in the rendition of the judgment of a plea which is in the said _____ Court before you, between _____ and _____, a manifest error hath happened, to the great damage of the said _____, as by _____ complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, within _____ days from the date hereof; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right, and according to the laws and custom of the United States, should be done.

Witness, the honorable Edward Douglass White, Chief Justice of the said Supreme Court, this _____ day of _____, in the year of our Lord one thousand nine hundred and _____.

[L. S.] Clerk of the Supreme Court of the United States.

Allowed (to operate as a supersedeas)

by _____,

Associate Justice of the Supreme Court of the United States.

Writ of Error from the Supreme Court to a State Court

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the (Judges, Judge or Justice of the court to which the writ runs), Greeting:

BECAUSE, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of — before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between — and —, wherein was drawn in question the validity of a treaty of (or statute of, or an authority exercised under) the United States, and the decision was against its validity (or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such its validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty of, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of said Constitution, treaty, statute or commission) a manifest error hath happened to the great damage of the said —, as by — complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment therein be given, that then under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, within — days from the date hereof; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right, and according to the laws and custom of the United States, should be done.

Witness, the Honorable Edward Douglass White, Chief Justice of the said Supreme Court, the — of — in the year of our Lord one thousand nine hundred and —.

[L. S.] Clerk of the Supreme Court of the United States
(or Clerk of the United States District Court of the Circuit in which the State is situated).

Allowed (to operate as a supersedeas)

by —,

Associate Justice of the Supreme Court of the United States.

(Or Chief Justice of the Supreme Court of the State of —.)

NOTE: No writ of error to a State court can issue without allowance, either by the proper judge of the State court or a Justice of the Supreme Court (after an examination of the record of the State court). *Gleason v. Florida*, 9 Wall. 779, 19 L. ed. 731.

Held in *Norfolk and S. Turnpike Co. v. Virginia*, 225 U. S. 264-269, 56 L. ed. 1086, that where a writ of error is prosecuted to an alleged judgment or decree of a State court of last resort declining to allow a writ of error to a lower State court, or an appeal from such lower court, unless it plainly appears on the face of the record by an affirmance in express terms of the judgment or decree sought to be reviewed, that the refusal of the State court of last resort to allow an appeal or writ of error was the exercise by it of jurisdiction to review the case upon the merits, the appeal or writ of error will run to the lower State court, the judgment of which the Supreme Court will hold is final.

Petition for Appeal to the Supreme Court

In the United States District Court in and for the _____ district of _____, _____ Term, 19-.

v.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, the _____ in the above entitled cause, would respectfully represent and show that in the above entitled cause pending in the United States District Court in and for the _____ district of _____, there was entered at the _____ term, 19-, of said court a final decree greatly to the prejudice and injury of your petitioner, which said decree is erroneous and inequitable in many particulars.

Wherefore, in order that your petitioner may obtain relief in the premises, and have opportunity to show the errors complained of, your petitioner prays that he may be allowed an appeal in said cause to this honorable court and that the proper orders touching the security required of him may be made.

by _____,
His Solicitor.

Citation to the Supreme Court

UNITED STATES OF AMERICA, To _____.

You are hereby notified that in a certain cause in equity in the United States District Court for the _____ district of _____ wherein _____ is complainant and _____ and _____, defendants, the _____ therein has prayed an appeal to the Supreme Court of the United States from the decree in said cause entered, and that such appeal has been allowed; wherefore you are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington, within _____ days from the date hereof, to show cause, if any there be, why the decree appealed

from should not be reversed and set aside, and relief be granted to said appellant as by him prayed and as to justice and equity may appertain.

Witness, the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States, this _____ day of _____, 19—.

_____,
Judge.

Supreme Courts Rules. Rule 8, Clause 5.

Bond on Appeal or Writ of Error

(Title of cause.)

Know all men by these presents that we, _____ as principal and _____ as sureties are held and firmly bound unto _____ in the full and just sum of _____ to be paid to the said _____, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this _____ day of _____, in the year of our Lord one thousand nine hundred and _____.

Whereas, lately at a _____, in a suit depending in the District Court of _____, between _____ and _____, a final decree (or a final judgment) was rendered against the said _____, and the said _____ having obtained the allowance of an appeal (or writ of error) and filed a copy thereof in the clerk's office of the said court to reverse the said decree (or judgment) in the aforesaid suit (or having prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment aforesaid) and a citation having issued directed to the said _____, citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within _____ days from the date hereof.

Now the condition of the above obligations is such that if the said _____ shall prosecute his appeal (or writ of error) to effect, and answer all damages and costs if _____ fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in the presence of _____.	}	_____ [L. S.],
		_____ [L. S.],
		_____ [L. S.]

Approved (to operate as a supersedeas)
by _____.

(The Justice or Judge who allows the appeal or writ of error.)

Justification

UNITED STATES OF AMERICA, DISTRICT OF _____.

_____ being duly sworn, depose and say each for himself that he is worth \$_____, over and above all just debts, liabilities and exemptions.

_____.

Sworn to before me this _____ day of _____, A. D. 19-
_____, Commissioner.

Approved the within bond this _____ day of _____, A. D. 19-.

_____ Clerk.

If the petition for the allowance of a writ of error is presented to an associate justice of the Supreme Court or to the chief justice of a State court, the above form of subscription may be varied accordingly.

Section 999, *Rev. Stats.*

FORMS FOR USE IN THE UNITED STATES CIRCUIT COURT OF APPEALS

Form of a Certificate from the Circuit Court of Appeals Under Sec. 239, of the Act of Mar. 3, 1911, The Judicial Code

(Title of the Court.)

(Title of the cause.)

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

This cause comes to this court upon a writ of error to review a judgment of the _____ Court of _____, entered upon a verdict of a jury in favor of _____, the _____ in error who was the _____ below.

Upon examination of the record it appears that in addition to questions as to the merits of the controversy presented by assignments of error, the jurisdiction of the District Court is in issue.

This court therefore elects to reserve judgment upon the other questions and to certify the question of jurisdiction to the Supreme Court.

Statement of Facts:

The action is for _____ (here set out the nature of the action).

The complainant avers _____.

The complainant further avers and the answer admits _____.

(Sufficient of the pleadings should be set out to enable the Supreme Court to determine the question of jurisdiction.)

Upon the trial the plaintiff testified ——— (here state such facts as may be necessary to a determination of the question of jurisdiction).

There was no other testimony in any way bearing upon the plaintiff's residence or citizenship (or other fact upon which jurisdiction depended).

Questions Certified:

Had the District Court jurisdiction of the controversy between the plaintiff and defendant?

In accordance with the provisions of sec. 239 of the Act of Mar. 3, 1911, entitled an Act to codify, revise and amend the laws relating to the judiciary, the foregoing question of law is by the Circuit Court of Appeals for the ——— Circuit hereby certified to the Supreme Court.

Witness my hand and official seal at ——— this ——— day of ———, A. D. 19—.

———, Clerk of the Circuit Court of Appeals for the ——— Circuit.

NOTE: The certificate from the Circuit Court of Appeals is required to contain a proper statement of the facts upon which the questions of law to be answered arise. The court will deal only with the facts certified and make answer only to questions of law. Questions of fact or mixed law and fact will not be answered. *Graver v. Faurot*, 162 U. S. 435, 40 L. ed. 1031.

The entire record should not be certified. The entire case may be required to be certified by the Supreme Court when questions are certified or when certiorari is issued to bring up a decision of the Circuit Court of Appeals that would otherwise be final. *Ib.*

Writ of Error

UNITED STATES OF AMERICA, ss:

The President of the United States of America, To the Honorable Judges of the ¹ ———, Greeting:

BECAUSE, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said ——— Court, before you, at the ——— Term, 19—, thereof, between ² ——— a manifest error hath happened, to the great damage of the said ³ ——— as by ——— complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit

¹ Here insert correct name of the court to which the writ is addressed and whose judgment is to be reviewed.

² Here insert correct style of cause showing who was plaintiff and who defendant in court below.

³ Here insert name of party or parties who sue out writ of error.

Court of Appeals, for the _____ Circuit, together with this writ, so that you have the said record and proceedings aforesaid at the city of _____, and filed in the office of the clerk of the United States Circuit Court of Appeals, for the _____ Circuit, on or before the ¹ _____ day of _____, 19—, to the end that the record and proceedings aforesaid being inspected, the United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States, this _____ day of _____, in the year of our Lord one thousand nine hundred and _____.

Issued at the Clerk's office in _____ with the seal of the ² _____ and dated as aforesaid.

_____,
Clerk of _____.

Allowed by _____,

_____, Judge.

Form of Return to be Endorsed on Writ of Error by the Clerk of the Court to Which the Writ is Addressed

UNITED STATES OF AMERICA, ss:

In obedience to the command of the within writ, I herewith transmit to the United States Circuit Court of Appeals, for the _____ Circuit, a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereto subscribe my name and affix the seal of ³ _____.

_____,
Clerk of _____.

The following form of citation and bond is adapted for appeals in equity cases as well as in cases of writs of error in actions at law:

¹ Consult Circuit Court of Appeals Rule 14, Clause 5, *ante*, page 255. In Eighth Circuit writs of error and appeals are returnable sixty days after citation is signed. In all other circuits, thirty days after. This blank must be filled accordingly, naming a day not more than _____ days after the date of the citation. In Eighth Circuit, 60 days. In all other circuits, 30 days. (See Rule 14, Clause 5, Rules of Circuit Court of Appeals, *ante*, page 264.)

² See sec. 1004, *Rev. Stats.*, and sec. 262, Judicial Code. This blank should be so filled as to show whether the writ is issued by the clerk of a United States District Court or by the clerk of the Circuit Court of Appeals.

³ Here describe the court to which the writ is addressed.

Form of Citation

UNITED STATES OF AMERICA, *To* _____, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the _____ Circuit, at the city of _____, within _____ (here insert 30 or 60 as required by Rule 14, Clause 5) days from and after the day this citation bears date, pursuant to ¹ _____ filed in the clerk's office of the ² _____ wherein _____ is ³ _____ and you are ⁴ _____, to show cause, if any there be, why the ⁵ _____ rendered against the said ⁶ _____ as in said ⁷ _____ mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable ⁸ _____, Judge of _____ this _____ day of _____, A. D. 19-.

_____,
Judge of _____.

Petition for Appeal to the Supreme Court from the Circuit Court of Appeals

To the Honorable the Judges of the Circuit Court of Appeals for the _____ Circuit.

In the United States Circuit Court of Appeals, _____ Circuit.
No. _____.

_____ v. _____. Petition for Appeal to the Supreme Court of the United States from the Circuit Court of Appeals for the _____ Circuit.

The above mentioned (appellant or appellee in the Court of Appeals) respectfully shows that the above entitled cause is now pending in the United States Circuit Court of Appeals for the _____ Circuit, and that (judgment or decree) therein has been rendered on the _____ day of _____, 191-, (affirming or reversing) the (judgment or decree) of the District Court of the United States for the _____ District of _____, and that the matter in controversy in said suit exceeds in value One Thousand Dollars (\$1000.00), besides costs: that this cause is one in which the United States Circuit Court of Appeals for the _____ Circuit has not final jurisdiction and that it is a proper cause to be reviewed by the Supreme Court of the United States on Appeal.

¹ Insert (a writ of error) or (an appeal allowed and).

² Insert name of court to which writ of error is addressed, or from which appeal is allowed.

³ Insert plaintiff in error or appellant.

⁴ Insert defendant in error or appellee.

⁵ Insert judgment or decree.

⁶ Insert plaintiff in error or appellant.

⁷ Insert writ of error or appeal.

⁸ As to who may sign citation, see secs. 998 and 999, *Rev. Stats., U. S.* and sec. 132, *Judicial Code.*

Wherefore, the said appellant prays that an appeal be allowed (him or it) in the above entitled cause, directing the Clerk of the United States Circuit Court of Appeals for the _____ Circuit to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors herewith filed by the said appellant may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

_____,
Solicitor and Counsel for Appellant.

Order Allowing Appeal from the Circuit Court of Appeals to the Supreme Court (to operate as supersedeas)

In the United States Circuit Court of Appeals, _____ Circuit.
No. _____.

_____, Appellant, v. _____, Appellee.

It is hereby ordered that an appeal in the above entitled cause to the Supreme Court of the United States be, and is hereby, allowed, as prayed; and that it operate as a supersedeas; and that the decree of the District Court of the United States for the _____ District of _____ herein, dated the _____ day of _____, 191- (save and except the provision in said decree and the portion thereof enjoining the said defendant, officers and agents, and all persons claiming by, through or under said defendant, since the filing of the bill of complaint herein, from _____), be hereby superseded pending said appeal, and until the same is finally heard and determined upon the appellant, _____, filing in addition to the appeal bond herein, another good and sufficient bond herein in the sum of _____ Dollars, conditioned as required by law, and that if the said _____ do prosecute the same to effect, and if it fails to make its appeal good, shall pay and answer all damages, costs, charges and interest in the said cause, then the said obligation to be void.

(Signed) _____,
United States Circuit Judge, _____ Circuit.

Form of Supersedeas or Cost Bond

KNOW ALL MEN BY THESE PRESENTS,

That we, _____, principal and _____ and _____, as sureties are held and firmly bound unto _____ in the full and just sum of _____ to be paid to the said _____ heirs, executors, administrators or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals, and dated this _____ day of _____, in the year of our Lord one thousand nine hundred and _____.

WHEREAS, lately at the _____ term of the _____ in a suit depending in said court between _____, plaintiff, and _____, defendant, _____ was rendered against the said _____ and the said _____ has obtained _____ of the said court to reverse the _____ in the aforesaid suit, and a citation directed to the said _____ citing and admonishing _____ to be and appear in the United States Circuit Court of Appeals for the _____ Circuit, at the city of _____, _____ (here insert 30 or 60 as required by Rule 14, Clause 5) days from and after the date of said citation.

Now, the condition of the above obligation is such, that if the said _____ shall prosecute said _____ to effect, and answer all damages and costs if _____ fail to make good _____ plea, then the above obligation to be void, else to remain in full force and virtue.

Sealed and delivered in presence of _____ [SEAL.]
 _____ [SEAL.]
 _____ [SEAL.]

Approved by _____,
 _____, Judge.

Form of Appearance Bond on Writ of Error in Criminal Cases

KNOW ALL MEN BY THESE PRESENTS:

That we, _____, as principal, and _____, as sureties, are held and firmly bound unto the United States of America in the full and just sum of _____ dollars, to be paid to the United States of America, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this _____ day of _____ in the year of our Lord, one thousand nine hundred and _____.

WHEREAS, lately at the _____ Term, A. D. 19—, of the District Court of the United States for the _____ district of _____, in a suit depending in said court between the United States of America, plaintiff, and _____, defendant, a judgment and sentence was rendered against the said _____, and the said _____ ha — obtained a writ of error from the United States Circuit Court of Appeals for the _____ Circuit, to reverse the judgment and sentence in the aforesaid suit, and a citation directed to the said United States of America, citing and admonishing the United States of America to be and appear in the United States Circuit Court of Appeals for the _____ Circuit, at the city of _____, _____ (here insert 30 or 60 as required by Rule 14, Clause 5) days from and after the date of said citation, which citation has been duly served.

Now the condition of the above obligation is such that if the said _____ shall appear either in person or by attorney in the United States Circuit Court of Appeals for the _____ Circuit on such day or days as may be appointed for the hearing of said cause in said court and

prosecute his said writ of error and shall abide by and obey all orders made by the United States Circuit Court of Appeals for the _____ Circuit in said cause, and shall surrender himself in execution of the judgment and sentence appealed from as said court may direct, if the judgment and sentence against him shall be affirmed; and if he shall appear for trial in the _____ Court of the United States for the _____ district of _____ on such day or days as may be appointed for a retrial by said _____ Court and abide and obey all orders made by said court provided the judgment and sentence against him shall be reversed by the United States Circuit Court of Appeals for the _____ Circuit; then the above obligation to be void, otherwise to remain in full force, virtue and effect.

_____ [SEAL.]

_____ [SEAL.]

_____ [SEAL.]

Approved:

_____,
Judge of the _____.

APPEALS, WRITS OF ERROR, RECORDS

Manner of Taking Appeals, Suing out Writ of Error, Making up Records, etc., in the Circuit Court of Appeals for the Fourth Circuit, from Instructions Prepared by Mr. Henry T. Meloney, Clerk, Published by Permission.

METHOD OF TAKING APPEALS

Writs of error and citations are no longer made returnable to the *term day* of the appellate court, but are made returnable not exceeding thirty days from the day of signing the citation, whether that day, which is the *return day*, fall in vacation or in term time; and the record must be filed in the clerk's office of this court before the *return day*, unless the time be enlarged as provided in Sec. 1 of Rule 16. In that case the order of enlargement must be filed with the clerk of this court.

Rule 11 entitled "Assignment of Errors," requires the plaintiff in error, or appellant, to file with the *court below*, with his *petition* for the writ of error or appeal, an assignment of errors, etc. This practically abolishes the necessity of pursuing the old method of praying appeals in "open court"; and all appeals and writs of error should be prayed for by *petition in writing* addressed to the *court below*, or to the judge in vacation, who allows the writ or the appeal, by an order in writing, approves the appeal or *supersedes* bond, and signs the citation.

In cases brought up by writ of error, from the District Courts, the *clerk of the District Court*, or the clerk of this court, issues the writ of error, which writ fixes the *return day* of the writ to this court, and the citation should bear the same

return day. But in cases of appeal (in admiralty or in equity), the citation alone fixes the *return day*.

All appeals, therefore, whether by writ of error or appeal, should hereafter be taken in the following manner:

(1) Petition in writing for the appeal, or writ of error, addressed to the court below, or the judge thereof in vacation.

(2) The petition must be accompanied with an assignment of errors, and a prayer for reversal.

(3) Appeal or writ of error bond, approval thereof, and the signing of the citation by the judge allowing the appeal or writ.

(4) Order in writing of the judge allowing the writ of error or appeal.

(5) Issuing the writ of error by the *clerk of the District Court* or of this court.

(6) In case it is desired to have the writ of error issued by the clerk of this court, a certified copy of the petition and order allowing the writ, under the seal of the court, with a fee of \$5 for issuing it, must be transmitted to the clerk of this court, and the writ will be issued and forwarded to the clerk of the court below.

All of the above papers and proceedings should be filed with the clerk of the lower court, and incorporated into and certified up in the record by him to this court, except the writ of error and the citation, the originals of which, after having been duly served, must be attached to and bound in the record at their respective places. (For service of writ of error see Sec. 1007, R. S.) . . .

In cases brought up by petitions to superintend and revise in bankruptcy see Rule 36 (Rules of 4th Circuit).

MAKING UP RECORDS

In making up a transcript of the record, clerks are requested to make a distinct title or heading to each paper or proceeding copied into the record, with the date of filing the same, or the date of such proceeding, and to write upon

but one side of the paper in a clear, legible hand. And a complete index should be made and attached to the record at the beginning of it.

In order to have uniformity, records should be commenced with the style and the term of the court at which the judgment or decree is entered, after the following form:

"The United States of America,
District of _____, to-wit:

At a District Court of the United States for the _____
District of _____, begun and held at the Court-house in
the city of _____, on the first Monday of _____, being
the _____ day of the same month, in the year of our Lord
one thousand, nine hundred and _____.

Present: The Honorable _____ District Judge, of
the _____ District of _____.

Among others were the following proceedings, to-wit:

A. B.	}	In Equity (or)
vs.		In Admiralty (or)
C. D.		At Law

Bill of Complaint (or)
Libel (or)
Declaration (or Complaint)
Filed, _____, 19—(date of filing)."

(Copy same with all material endorsements, and any accompanying papers and exhibits, and so on with every paper or proceeding in the case.)

As to the general order of making up a record, the following examples are given:

IN EQUITY	IN ADMIRALTY	AT LAW
1. Style of Court as Above.	1. Style of Court as Above.	1. Style of Court as Above.
2. Bill of Complaint, etc.	2. Libel.	2. Declaration.
3. Process.	3. Process.	3. Process.
4. Marshal's Return.	4. Marshal's Return.	4. Marshal's Return.
5. Answer.	5. Claim.	5. Plea or Demurrer, etc.
6. Replication.	6. Stipulation.	6. Joining of Issue.
7. Testimony and Exhibits for Complainant.	7. Answer.	7. Impaneling Jury.
8. Testimony and Exhibits for Defendant.	8. Testimony and Exhibits for Libellants.	8. Verdict.
9. Testimony and Exhibits in Rebuttal (if any).	9. Testimony and Exhibits for Respondent.	9. Judgment.
10. Opinion.	10. Testimony and Exhibits in Rebuttal (if any).	10. Bill of Exceptions.
11. Decree.	11. Opinion.	11. Petition for Writ of Error.
12. Petition for Appeal.	12. Decree.	12. Assignment of Errors.
13. Assignment of Errors.	13. Petition for Appeal.	13. Bond and Approval.
14. Appeal Bond and Approval.	14. Assignment of Errors.	14. Order Allowing Writ.
15. Order Allowing Appeal.	15. Appeal Bond and Approval.	15. Writ of Error.
16. Citation.	16. Order Allowing Appeal.	16. Citation.
17. Clerk's Certificate.	17. Citation.	17. Clerk's Certificate.
	18. Clerk's Certificate.	

In making up records in admiralty cases the following should be omitted (see Admiralty Rule 52):

1. The continuances.
2. All motions, rules, and orders not excepted to which are merely preparatory for trial.
3. The commissions to take depositions, notices therefor, their captions, and certificates of their being sworn to, unless some exception to a deposition in the District Court was founded on some one or more of these; in which case, so much of either of them as may be involved in the exception shall be set out. In all other cases it shall be sufficient to give the name of the witness and to copy the interrogatories

and answers, and to state the name of the commissioner, and the place where and the date when the deposition was sworn to; and, in copying all depositions taken on interrogatories, the answer shall be inserted immediately following the question.

**Form of Memorandum to be Inserted in a Common Law Case
as Provided by Sec. 7 of Rule 14**

(1) Petition for writ of error filed _____ day of _____, 19—.

(2) Writ of error granted _____ day of _____, 19—.

(3) Writ of error issued _____ day of _____, 19—.

(4) Copy of writ of error lodged for adverse party _____ day of _____, 19—.

(5) Appeal Bond: Dated _____ day of _____, 19—.

Penalty \$_____.

Obligors: _____

Conditioned for costs and damages (or for costs).

(6) Citation. Dated _____ day of _____, 19—.

Return, dated _____ day of _____, 19—. (Or waiver of service, dated _____ day of _____, 19 .)

NOTE: Similar memorandum *mutatis mutandis* to be used in admiralty and equity cases.

The petition for writ of error or appeal, the order granting writ of error or appeal, the writ of error, the appeal bond, the citation, the return of service or waiver of service should not be copied into the record, but the originals thereof should be sent up and accompany the transcript of the record.

In transcribing bills of exceptions into the record in cases at law, clerks will carefully inspect such bills of exceptions and wherever the words "here insert" occur, the paper or matter called for should be bodily incorporated into the record at that place.

Form for the Cover of a Transcript of the Record**TRANSCRIPT OF THE RECORD****UNITED STATES CIRCUIT COURT OF APPEALS****Fourth Circuit****No. _____.**

_____, Plaintiff in Error or Appellant, or Petitioner,
versus

_____, Defendant in Error, or Appellee, or Respondent.

In error (or appeal from, or on petition for review from) the District
 Court of the United States for the _____ District of _____ at
 _____.

NOTE: All records are transmitted to the appellate court by order of the court below; and if such order is not expressed in writing, it is implied, and the clerk should always enter immediately preceding his certificate the following order:

"And, thereupon, it is ordered by the court here that a transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Fourth Circuit; and the same is transmitted accordingly.

"Teste. _____, Clerk."

Then comes the general certificate of the clerk, in the usual form, that the foregoing is a full and true record, etc., with the seal of the court attached.

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TO THE

PRESENT RULES OF THE SUPREME COURT

BY NUMBERS AND TITLES

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